

MT LEGISLATIVE HISTORY

Chapter 667 1985

Bill H (S) 28

Original bill & hist. ✓ C

H. Committee on Judiciary

S. Committee on Judiciary

Hearing Date(s) Mar 12 ✓ C

Hearing Date(s) Jan 14 ✓ C

Mar 22 ✓ C

Jan 16 ✓ C

 C

Feb 13 ✓ C

 C

Feb 18 10:05 am ✓ C

Feb 20 ✓ C

Date Out Mar 22 ✓ C

Feb 20 ✓ C

Did this bill originate in an interim committee? Yes No

Committee

Report

SENATE FINAL STATUS

1/19	2ND READING PASS	42	0
1/22	3RD READING PASS	37	10

	TRANSMITTED TO HOUSE		
1/23	REFERRED TO JUDICIARY		
3/08	HEARING		
3/08	COMMITTEE REPORT-BILL CONCURRED		
3/09	2ND READING NOT CONCURRED	59	33
3/09	BILL KILLED		

SB 28 INTRODUCED BY ECK
EXTENDING RES. WATER RIGHTS COMPACT COMMISSION AND
CHANGES IN WATER ADJUDICATION
BY REQUEST OF INDIAN AFFAIRS COMMITTEE

1/07	INTRODUCED		
1/07	REFERRED TO JUDICIARY		
1/08	FISCAL NOTE REQUESTED		
1/12	FISCAL NOTE RECEIVED		
1/14	HEARING		
2/13	HEARING		
2/21	COMMITTEE REPORT-BILL PASS AS AMENDED		
2/23	2ND READING PASS AS AMENDED	49	0
2/25	3RD READING PASS	48	0

	TRANSMITTED TO HOUSE		
2/27	REFERRED TO JUDICIARY		
3/12	HEARING		
3/23	COMM REPORT-BILL CONCURRED AS AMENDED		
3/26	2ND READING CONCURRED	95	0
3/28	3RD READING CONCURRED	97	2

	RETURNED TO SENATE WITH AMENDMENTS		
4/02	2ND READING AMENDMENTS CONCURRED	50	0
4/04	3RD READING AMENDMENTS CONCURRED	49	0
4/11	SIGNED BY PRESIDENT		
4/11	SIGNED BY SPEAKER		

4/12	TRANSMITTED TO GOVERNOR		
4/17	RETURNED WITH GOVERNOR'S AMENDMENTS		
4/18	2ND READING GOVERNOR'S AMENDMENTS		
	CONCURRED	50	0
4/19	3RD READING GOVERNOR'S AMENDMENTS		
	CONCURRED	50	0

	TRANSMITTED TO HOUSE		
4/24	2ND READING GOVERNOR'S AMENDMENTS		
	CONCURRED	92	2
4/24	3RD READING GOVERNOR'S AMENDMENTS		
	CONCURRED	89	4

	RETURNED TO SENATE		
4/26	SIGNED BY PRESIDENT		
4/30	SIGNED BY SPEAKER		

4/30	TRANSMITTED TO GOVERNOR		
4/30	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 667 EFFECTIVE DATE:	4/30/85	

SB 29 INTRODUCED BY SHAW

2

SENATE BILL NO. 28

INTRODUCED BY ECK

BY REQUEST OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

IN THE SENATE

January 7, 1985	Introduced and referred to Committee on Judiciary.
January 8, 1985	Fiscal Note requested.
January 12, 1985	Fiscal Note returned.
February 21, 1985	Committee recommend bill do pass as amended. Report adopted.
February 22, 1985	Bill printed and placed on members' desks.
February 23, 1985	Second reading, do pass as amended.
February 25, 1985	Correctly engrossed.
	Third reading, passed. Ayes, 48; Noes, 0.
	Transmitted to House.

IN THE HOUSE

February 27, 1985	Introduced and referred to Committee on Judiciary.
March 23, 1985	Committee recommend bill be concurred in as amended. Report adopted.
March 26, 1985	Second reading, concurred in.

March 28, 1985

Third reading, concurred in.

Returned to Senate with
amendments.

IN THE SENATE

March 28, 1985

Received from House.

April 2, 1985

Second reading, amendments
concurred in.

April 4, 1985

Third reading, amendments
concurred in. Ayes, 49;
Noes, 0.

Sent to enrolling.

April 10, 1985

Correctly enrolled.

April 11, 1985

Signed by President.

Signed by Speaker.

April 12, 1985

Delivered to Governor.

April 17, 1985

Returned from Governor with
recommended amendments.

April 18, 1985

Second reading, Governor's
amendments concurred in.

April 19, 1985

Third reading, Governor's
amendments concurred in.

Governor's amendments
transmitted to House.

IN THE HOUSE

April 23, 1985

Received from Senate.

Second reading, pass
consideration.

April 24, 1985

Second reading, Governor's
amendments concurred in.

Third reading, Governor's
amendments concurred in.

Returned to Senate.

IN THE SENATE

April 25, 1985

Received from House.

Sent to enrolling.

Reported correctly enrolled.

1 SENATE BILL NO. 28
2 INTRODUCED BY ECK
3 BY REQUEST OF THE SELECT COMMITTEE ON INDIAN AFFAIRS
4
5 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A 2-YEAR
6 EXTENSION OF THE EXISTENCE OF THE RESERVED WATER RIGHTS
7 COMPACT COMMISSION; PROVIDING FOR FEDERAL APPROVAL OF A
8 COMPACT ONLY IF LEGALLY NECESSARY; REQUIRING THAT THE TERMS
9 OF A COMPACT SET FORTH IN A PRELIMINARY DECREE BE REPRODUCED
10 UNCHANGED IN THE FINAL DECREE; EXTENDING FROM 60 DAYS TO 6
11 MONTHS THE TIME PERIOD FOR FILING IN THE WATER COURT CLAIMS
12 UNRESOLVED BY THE COMPACT COMMISSION; AMENDING SECTIONS
13 85-2-217, 85-2-231, 85-2-234, AND 85-2-702, MCA; AND
14 PROVIDING AN IMMEDIATE EFFECTIVE DATE."
15
16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
17 Section 1. Section 85-2-217, MCA, is amended to read:
18 "85-2-217. Suspension of adjudication. While
19 negotiations for the conclusion of a compact under part 7
20 are being pursued, all proceedings to generally adjudicate
21 reserved Indian water rights and federal reserved water
22 rights of those tribes and federal agencies which are
23 negotiating are suspended. The obligation to file water
24 rights claims for those reserved rights is also suspended.
25 This suspension shall be effective until July 1, ~~1985~~ 1987,

1 as long as negotiations are continuing or ratification of a
2 completed compact is being sought. If approval by the state
3 legislature and tribes or federal agencies has not been
4 accomplished by July 1, ~~1985~~ 1987, the suspension shall
5 terminate on that date. Upon termination of the suspension
6 of this part, the tribes and the federal agencies shall be
7 subject to the special filing requirements of 85-2-702(3)
8 and all other requirements of the state water adjudication
9 system provided for in Title 85, chapter 2. Those tribes and
10 federal agencies that choose not to negotiate their reserved
11 water rights shall be subject to the full operation of the
12 state adjudication system and may not benefit from the
13 suspension provisions of this section."

14 Section 2. Section 85-2-231, MCA, is amended to read:
15 "85-2-231. Preliminary decree. (1) The water judge
16 shall issue a preliminary decree. The preliminary decree
17 shall be based on:

- 18 (a) the statements of claim before the water judge;
19 (b) the data submitted by the department;
20 (c) the contents of compacts approved by the Montana
21 legislature and the tribe or federal agency or, lacking an
22 approved compact, the filings for federal and Indian
23 reserved rights; and
24 (d) any additional data obtained by the water judge.
25 The preliminary decree shall be issued within 90 days after

1 the close of the special filing period set out in
2 85-2-702(3) or as soon thereafter as is reasonably feasible.
3 This section does not prevent the water judge from issuing
4 an interlocutory decree or other temporary decree if such a
5 decree is necessary for the orderly administration of water
6 rights prior to the issuance of a preliminary decree.

7 (2) A preliminary decree may be issued for any
8 hydrologically interrelated portion of a water division,
9 including but not limited to a basin, subbasin, drainage,
10 subdrainage, stream, or single source of supply of water, at
11 a time different from the issuance of other preliminary
12 decrees or portions of the same decree.

13 (3) The preliminary decree shall contain the
14 information and make the determinations, findings, and
15 conclusions required for the final decree under 85-2-234.
16 The water judge shall include in the preliminary decree, for
17 informational purposes, the contents of a compact negotiated
18 under the provisions of part 7 that has been approved by the
19 legislature and the tribe or federal agency whether or not
20 it has been ratified by congress.

21 (4) If the water judge is satisfied that the report of
22 the water master meets the requirements for the preliminary
23 decree set forth in subsections (1) and (3), and is
24 satisfied with the conclusions contained in the report, the
25 water judge shall adopt the report as the preliminary

1 decree. If the water judge is not so satisfied, he may, at
2 his option, recommit the report to the master with
3 instructions, or modify the report and issue the preliminary
4 decree."

5 Section 3. Section 85-2-234, MCA, is amended to read:

6 "85-2-234. Final decree. (1) The water judge shall, on
7 the basis of the preliminary decree and on the basis of any
8 hearing that may have been held, enter a final decree
9 affirming or modifying the preliminary decree. If no
10 request for a hearing is filed within the time allowed, the
11 preliminary decree automatically becomes final, and the
12 water judge shall enter it as the final decree.

13 (2) The terms of a compact negotiated and ratified
14 under 85-2-702 must be included in the final decree without
15 alteration.

16 ~~(2)~~(3) The final decree shall establish the existing
17 rights and priorities within the water judge's jurisdiction
18 of persons required by 85-2-221 to file a claim for an
19 existing right and of persons required to file a declaration
20 of existing rights in the Powder River Basin pursuant to an
21 order of the department or a district court issued under
22 sections 8 and 9 of Chapter 452, Laws of 1973.

23 ~~(3)~~(4) The final decree shall state the findings of
24 fact, along with any conclusions of law, upon which the
25 existing rights and priorities of each person named in the

1 decree are based.

2 ~~(4)~~(5) For each person who is found to have an
3 existing right, the final decree shall state:

4 (a) the name and post-office address of the owner of
5 the right;

6 (b) the amount of water, rate, and volume, included in
7 the right;

8 (c) the date of priority of the right;

9 (d) the purpose for which the water included in the
10 right is used;

11 (e) the place of use and a description of the land, if
12 any, to which the right is appurtenant;

13 (f) the source of the water included in the right;

14 (g) the place and means of diversion;

15 (h) the inclusive dates during which the water is used
16 each year;

17 (i) any other information necessary to fully define
18 the nature and extent of the right."

19 Section 4. Section 85-2-702, MCA, is amended to read:

20 "85-2-702. Negotiation with Indian tribes. (1) The
21 reserved water rights compact commission, created by
22 2-15-212, may negotiate with the Indian tribes or their
23 authorized representatives jointly or severally to conclude
24 compacts authorized under 85-2-701. Compact proceedings
25 shall be commenced by the commission. The commission shall

1 serve by certified mail directed to the governing body of
2 each tribe a written request for the initiation of
3 negotiations under this part and a request for the
4 designation of an authorized representative of the tribe to
5 conduct compact negotiations. Upon receipt of such written
6 designation from the governing body of a tribe, compact
7 negotiations shall be considered to have commenced.

8 (2) When the compact commission and the Indian tribes
9 or their authorized representatives have agreed to a
10 compact, they shall sign a copy and file an original copy
11 with the department of state of the United States of America
12 and copies with the secretary of state of Montana and with
13 the governing body for the tribe involved. The compact is
14 effective and binding upon all parties upon ratification by
15 the legislature of Montana, any affected tribal governing
16 body, and, if legally necessary, the congress of the United
17 States or other appropriate federal authority.

18 (3) Upon its approval by the Montana legislature and
19 the tribe or federal agency, the terms of a compact must be
20 included in the preliminary decree for informational
21 purposes as provided by 85-2-231, and unless renegotiated,
22 the terms of the compact must be included in the final
23 decree without alteration. However, if approval of the state
24 legislature and tribe or federal agency has not been
25 accomplished by July 1, 1985 1987, all federal and Indian

1 claims for reserved water rights that have not been resolved
2 by a compact must be filed with the department within 60
3 days 6 months. These new filings shall be used in the
4 formulation of the preliminary decree and shall be given
5 treatment similar to that given to all other filings."

6 NEW SECTION. Section 5. Effective date. This act is
7 effective on passage and approval.

-End-

STATE OF MONTANA
FISCAL NOTE

REQUEST NO. FNN-021-85

Form BD-15

In compliance with a written request received January 10, 19 85, there is hereby submitted a Fiscal Note for Senate Bill 28 pursuant to Title 5, Chapter 4, Part 2 of the Montana Code Annotated (MCA). Background information used in developing this Fiscal Note is available from the Office of Budget and Program Planning, to members of the Legislature upon request.

BRIEF DESCRIPTION:

Senate Bill 28 proposes to extend the period for negotiating compacts with Indian tribes and federal agencies. It continues the suspension of filing reserved water rights claims in the state's water court.

ASSUMPTIONS:

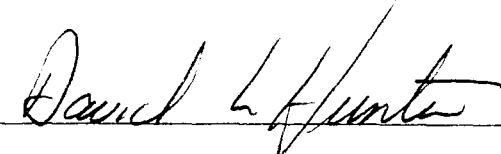
1. Nine commission members meet and travel on the average of twice monthly
2. Technical and legal staff required at existing levels
3. Special counsel required under terms of current contract
4. Substantial expense required in providing transcripts of all proceedings
5. Operating expenses are increased 10% over existing (FY 84) level, as a result of increased interest on the part of the federal government and tribes

FISCAL IMPACT:

Current law provides for expiration of the negotiation process and the state's negotiating body -- the Reserved Water Rights Compact Commission on June 30, 1985. SB 28 will continue the commission at its current level

EXPENDITURES:

	<u>FY 86</u>	<u>FY 87</u>
Current Law	\$ -0-	\$ -0-
Proposed Law	\$ 224,406	\$ 224,485 - General Fund
Increase	\$ 224,406	\$ 224,485


BUDGET DIRECTOR
Office of Budget and Program Planning

Date: Jan 12, 1985

CHAIRMAN--MAZUREK, JOE

SECRETARY--STALEY, CINDY

NORMAL SCHEDULE==> SITE: OLD SUPREME COURT ROOM DAYS: M-TU-W-TH-F

TIME: 10:00 A.M.-12 NOON

BILL NO	REFER DATE	HEARING DATE	CONSIDERATION DATES	COMMITTEE ACTION	REREFERRED TO COMM	DATE OUT
SB0002	1/07	1/15	1/17	PASS AS AMENDED		1/18
SHAW, JAMES N.			AMEND DRINKING AGE LAWS TO AGE 21 TO	CONFORM TO CONSTITUTIONAL AMENDMENT		
SB0003	1/07	1/15		PASS AS AMENDED		1/17
SHAW, JAMES N.			AMEND CONSTITUTION TO RAISE LEGAL DRINKING AGE TO 21			
SB0005	1/07	1/08	1/09 1/10	DO PASS		1/11
DANIELS, M.K.			PRECEDENCE OF CHANGED MCA OVER REDUNDANT UNCODIFIED PROVISION OF LAW			
SB0024	1/07	1/09	1/10	DO PASS		1/11
TOWE, THOMAS E.			TO CLARIFY LIMITATIONS ON STATE TRIBAL COOPERATIVE AGREEMENTS			
SB0026	1/07	1/09	1/10	PASS AS AMENDED		1/11
TOWE, THOMAS E.			PERMITTING SALE OR EXCHANGE OF STATE LANDS TO MONTANA INDIAN TRIBES			
SB0027	1/07	1/10	1/16	PASS AS AMENDED		1/17
DANIELS, M.K.			ORIENTATION SESSIONS AND TRAINING SESSIONS FOR DISTRICT COURT CLERKS			
SB0028	1/07	1/14 & 2/13	1/16 2/18 2/20	PASS AS AMENDED		2/18
ECK, DOROTHY			EXTENDING RES. WATER RIGHTS COMPACT COMMN AND CHANGES IN WATER ADJUDICATION			
SB0030	1/07	1/08	1/10	ADVERSE REPORT		1/17
TOWE, THOMAS E.			WARNING TO DRIVER WHO GETS 15 POINTS TOWARD HABITUAL TRAFFIC OFFENDER STATUS			
SB0054	1/21	Rereferred from 2nd Reading	1/28	PASS AS AMENDED		1/29
TOWE, THOMAS E.			FELONY TO ABUSE, NEGLECT, OR EXPLOIT A PERSON 60 OR MORE YEARS OLD			
SB0055	1/11	1/24	2/06	PASS AS AMENDED		2/16
TOWE, THOMAS E.			LIMITING TIME TO CHALLENGE VALIDITY OF COUNTY'S MINERAL INTEREST - TAX DEED			
SB0056	1/07	1/14		ADVERSE REPORT		1/16
CHRISTIAENS, B.F. CHRIS			ESTABLISH ASSUMPTION OF THE RISK AS ABSOLUTE DEFENSE IN CIVIL ACTIONS			

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

January 14, 1985

The fifth meeting of the Senate Judiciary Committee was called to order at 10:00 a.m. on January 14, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

CONSIDERATION OF SB 28 AND 69: Chairman Mazurek stated the hearings on SB 28 and SB 69 would be held simultaneously since the bills were similar and on the same topic. Senator Dorothy Eck, the sponsor of SB 28, stated SB 28 was presented by request of the Select Committee on Indian Affairs. Senator Eck submitted amendments prepared by the Select Committee on Indian Affairs (see Exhibit 1) and provided the committee with code statutes dealing with the Reserved Water Rights Compact Commission (see Exhibit 2). Senator Eck expressed some concern over the provision in SB 69 stating no compact proceedings may commence after July 1, 1985. She requested that the committee not act on this particular matter until we are sure this does not create a public relations problem with the tribes. Senator Eck suggested an amendment be considered making the cutoff date January 1, 1986. Senator Eck stated she felt her fourth and fifth proposed amendments were substantive. As it appears every compact will be quite different and some may require approval by Congress, although some may require no federal approval or some may need approval by the Department of Interior, assuming these requirements are written into the compact, she feels we should not even mention Congress in our legislation and feels the problem is best solved by deleting that language entirely. Senator Eck felt the committee might want to consider amending page 6, line 18, of SB 28 by deleting the word "approval" and inserting the word "ratification," as that may be a more appropriate word. Senator Eck then addressed subsection 3, which was amended in 1981, which speaks in three places about the tribes or federal agency. They determined that the "or federal agency" really refers to compacts that are being negotiated with federal agencies. Since all of these are dealt with in Section 85-2-703, MCA, it is repetitious and confusing to have that language in this section, and deletion of it is really a housekeeping measure. Senator Eck then referred to page 6 of SB 28, lines 21 and 23, and the phrases "and unless renegotiated" and "without alteration." She stated it has been suggested that they could omit those phrases. Senator Eck provided the committee with a letter from Brenda Desmond to Chief Water Judge, Judge W. W. Lessley, and Judge Lessley's response (see Exhibit 3) which

12

expressed his concerns and approval of what was being done. Senator Eck is glad this bill is before the Judiciary Committee as she believes there are a good many legal points that must be considered. Senator Eck further believes it is an issue that is very important to our whole water adjudication process.

Senator Galt, sponsor of SB 69, explained that his bill is introduced by request from the Reserved Water Rights Compact Commission. The commission was instituted under SB 76 in 1979, which also authorized general adjudication of water in the state of Montana and the quantification of that water. Senator Galt explained how the members were appointed to the commission. He further explained the commission is not answerable to any agency of the government, although everything the commission comes up with will be presented to the legislature. He explained that Section 1 of SB 69 states the commission will be reporting to Judge Lessley or his successor; Section 2 extends the compact commission sunset provisions for another two years. Since the commission is just in existence as long as it is negotiating, this will give it two more years to complete negotiations. Senator Galt stated that regarding Section 3, the only agency or tribe that is not in negotiations right now is the Blackfeet Tribe. The commission has met with them, and they have been kept informed of the actions taking place. Senator Galt believes the July 1, 1985, deadline for commencement of negotiations should remain in there. Senator Galt stated the termination provisions in Section 4 were set in SB 76 and any negotiations can be terminated by writing to the opposite party 30 days before the proposed termination date. This would give parties who have terminated a chance to retract that termination and come back to negotiations. Also, the tribes and agencies can terminate. In addition, the commission can terminate. Senator Galt stated he would propose some amendments in executive session (see Exhibit 4). Senator Galt explained that reserved water right holders do not have to prove they are using or holding the water. Their priority date is the date the water reservation was made. Although they don't have to prove the use of the water, they have that water forever. Since their rights are different than water users' rights, they need another form that doesn't require information that is not pertinent to them.

PROPOSERS: K. M. Kelly, representing the Montana Water Development Association, stated they presently do not have any position on either bill except they presently support the concept that the commission should be extended. They find no fault with either bill, although they hope one bill would come out. They lean toward Senator Galt's bill because it comes from the commission itself, and the commission should know what it needs. (See witness sheet attached as Exhibit 5.) Linda Hickman, a water master from the Water Court in Bozeman, stated Judge Lessley asked her to come to this hearing to state he feels the commission has done and is doing a fine job. The Water Court is not opposed

to a two-year extension, although the judge and the court would like to see a provision in the bill which would require the commission to make periodic progress reports to the Water Court, since the legislature has mandated they expedite negotiations in the state. (See witness sheet attached as Exhibit 6.) Daniel Decker, tribal attorney for the Confederated Salish and Kootenai Tribes, appeared on behalf of the tribes to speak out in support of both bills. The tribes feel very strongly that negotiations should continue. Mr. Decker pointed out that the State of Wyoming has entered into litigation with the Wind River Tribes and has expended more than \$7 million in litigation to negotiate water rights with one tribe. Montana should note that reserved water rights are an important issue to the tribes, and the extension is warranted. With regard to Senator Eck's bill, Mr. Decker stated the Confederated Tribes favor entering a compact into a preliminary decree for informational purposes without alteration. The tribes are also in favor of a six-month filing after negotiations have been terminated, as the tribes have many streams they would have to file on, and the Chief Water Judge did not feel a general water filing would be acceptable. With regard to SB 69, there was some concern with the deadline date for beginning compact negotiations. Mr. Decker stated he cannot speak on behalf of the Blackfeet Tribe that is not in negotiations, but gave a short history of the Confederated Tribes' withdrawal and then return to the negotiation table. Mr. Decker felt a provision such as this would prevent their return to the negotiation table. He also felt the committee should note the costs are great if you cannot negotiate and you are forced into litigation. (See witness sheet attached as Exhibit 7.) Representative Roland Kennerly appeared and stated he is a member of the Blackfeet Tribal Business Council. He stated they could live with SB 28. The Blackfeet are very interested in water, being one of the reservations that have the headwaters. The only thing they take exception to is the commission wants to set a deadline on their negotiations. The Blackfeet elected a new council in July. Out of the nine-man council, eight were new members. Although the council is going in the direction of negotiating, it is leary of doing so right now. They object to the amendments in the bill of setting a deadline for them. If they are threatened with a deadline, Representative Kennerly feels the council may be unwilling to negotiate. (See additional written testimony submitted to the committee by Louis Clayborn, Coordinator of Indian Affairs for the State of Montana, attached as Exhibit 8. Mr. Clayborn did not testify orally before the committee.)

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: Senator Towe asked that someone from the commission explain why they have trouble with the "informational purposes" and "without alteration" phrases. Marcia Rundle, staff attorney for the Compact Commission, stated there was some discussion in the

Senate Judiciary Committee
Minutes of the Meeting
January 14, 1985
Page 4

commission and with the commission's special counsel regarding that language, and the concerns at that time were due process issues. There was some discussion about whether that would raise potential constitutional problems. The commission has not met since that time, and they are at this time interested in discussing this issue with the full commission. Senator Towe questioned whether she was suggesting that in the subsection 3 language that she is proposing, which is a different type of information required, that one of the answers that would be made would be the authority for this particular claim for the compact that has been negotiated by the parties. Ms. Rundle thinks that was the intent. Senator Towe questioned whether by saying that, we do not really need the language "for informational purposes." Ms. Rundle believes they do not have strong objection to the language. Senator Towe questioned whether in her research she found any problems. Ms. Rundle stated the reason there is a problem in taking a strong position is they are on the cutting edge. She can find no authority where constitutional questions have been answered. Her research suggests the states can bind the citizens to the terms of a compact. Senator Towe then addressed a question to Mr. Decker and asked that he address the same question regarding "for informational purposes" and "without alteration." Mr. Decker personally saw no problem with binding the citizens by statute to a compact. He does not think the language would be objectionable. Senator Pineseault addressed a question to Representative Kennerly as to what was presently the membership of the tribal council. Representative Kennerly responded nine members, eight of whom were recently replaced, as they have elections every two years. Senator Pineseault questioned how many members of the council would have to agree to enter into negotiations. Representative Kennerly stated two-thirds, or six. Senator Yellowtail addressed a question to Mr. Decker. He stated Mr. Decker referred to the matter of a deadline that is being suggested in SB 69. He is interested in the matter of Mr. Decker's observation that this could preclude a tribe from terminating negotiations and then deciding to re-enter negotiations. Senator Yellowtail questioned whether Mr. Decker thought it would be adequate to back that deadline up six months or whether it would be necessary to have a deadline at all. Mr. Decker stated the earlier bill did not have that date at all and does not know why it is necessary. Mr. Decker thinks it is necessary to extend that date, as the language limits the alternatives available. He further believes the deadline is more harmful than helpful. Senator Yellowtail asked whether Mr. Decker had a specific date he would suggested as a compromise to back the deadline back a ways. Mr. Decker stated that since the extension for the bill is two years, a 12-month extension might be more appropriate than six months. Senator Mazurek stated the commission's concern was they have been going since July 1, 1979, and the rationale for the deadline is they have to get these done, so they fit into the adjudication process. He asked whether the tribes opposed any deadline at all or would a compromise of

July 1, 1986, be acceptable. Mr. Decker stated he thinks a compromise as far as a deadline date may be helpful, although he believes a deadline may cause litigation. Senator Towe addressed a question to Mr. Decker about the language in SB 69 at the end about retracting the termination. He doesn't see a deadline as to when you can retract. Senator Towe asked for Mr. Decker's comments about this language. Mr. Decker again stated that is a pretty short time frame. Senator Towe stated it was intended that the retraction would put you back into negotiations. It doesn't say when one must file the retraction notice. Senator Towe questioned whether there were any intent on the part of the commission that this language exclude the notice by limiting it to a particular time. Senator Mazurek stated that during the 30-day period, a retraction could be filed and void the effect of the notice of termination. Senator Towe asked Mr. Decker if that were any consolation and if it helped in accepting a deadline on negotiations. Mr. Decker stated he believed whatever feelings caused the termination would be hard to overturn in that short a period of time. Senator Towe asked what the effect of that would be stating the water adjudication process had to continue on non-Indian lands. While that is continuing, if the deadline were not extended, were we not in effect postponing the adjudication of everyone else's water rights. Mr. Decker stated that from the tribes' point of view, that may be a reasonable period of time. However, without the extension, they would have to be in litigation with the State of Montana. Senator Galt felt that since SB 76, this would be to the advantage of the Indian tribes, and it would probably be legalizing the negotiations that are going on right now.

CLOSING STATEMENT: Senator Eck stated she wanted to recognize the committee still has a lot of work ahead of it. The commission should be commended for making some significant efforts of getting the tribes back into the process, and the tribes need to be commended for accepting that. She recognizes that we are on the cutting edge in the whole matter of water law here. In discussing the process of litigation versus negotiation and mediation, if we are successful, it will save the State of Montana a lot of dollars.

Hearing on SB 28 and SB 69 was closed.

CONSIDERATION OF SB 56: Senator Christiaens, sponsor of SB 56, stated this is a bill that would establish assumption of risk as an absolute defense. He explained that the two principal defenses for common law negligence actions are assumption of risk and contributory negligence. The term, assumption of risk, is often used in two different senses, one of which is its principal meaning and the other, its secondary, which is equivalent to contributory negligence.

112

SENATE JUDICIARY

COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 01/4/85

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt	X		
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe	X		
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels	X		
Chairman Senator Joe Mazurek	X		

Proposed Amendments to SB 28

1. Title, lines 7 and 8
Following: "COMMISSION;" on line 7
Strike: "PROVIDING" through "NECESSARY" on line 8
Insert: "ELIMINATING THE REQUIREMENT OF CONGRESSIONAL
APPROVAL OF A COMPACT"
2. Page 3, line 19
Following: "agency"
Strike: remainder of line 19 through "congress" on line 20
3. Page 4, line 14
Following: "decree"
Strike: "without alteration"
4. Page 6, line 15
Following: "Montana"
Strike: ", "
Insert: "and"
5. Page 6, line 16
Following: "body"
Strike: ", and" through "authority" on line 17
6. Page 6, line 19
Following: "tribe"
Strike: "or federal agency"
7. Page 6, line 24
Following: "tribe"
Strike: "or federal agency"
8. Page 6, line 25
Following: "all"
Strike: "federal and"

AMEND/hm/SB 28

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 1

DATE 01/14/85

BILL NO. SB 28

18

(5) Members appointed to the commission shall serve until the work of the commission is completed or until they resign or are otherwise unable to serve. A vacancy must be filled in the manner of the original appointment.

History: En. Sec. 27, Ch. 697, L. 1979.

Cross-References

General powers and duties, 85-2-701.

2-15-213. Flathead basin commission — membership — compensation. (1) There is a Flathead basin commission.

(2) The commission consists of 15 members selected as follows:

(a) four members appointed by the governor from industrial, environmental, and other groups affected by Title 75, chapter 7, part 3, one of whom must be on the governor's staff and who also serves as the executive director;

(b) one member who shall be the commissioner of state lands or his designee;

(c) one member appointed by the Flathead County commissioners;

(d) one member appointed by the Lake County commissioners;

(e) one member appointed by the Confederated Salish and Kootenai Tribes;

(f) one member appointed by the United States department of agriculture, forest service regional forester for the northern region;

(g) one member appointed by the United States department of interior national park service, regional director for the Rocky Mountain region;

(h) five ex officio members appointed respectively by the chief executive of the provincial government of the Province of British Columbia, the regional administrator of the United States environmental protection agency, the administrator of the Bonneville Power Administration, the chief of engineers of the United States army corps of engineers, and the holder of a license issued for the Flathead project under the Federal Power Act.

(3) The commissioners shall serve without pay. Commissioners mentioned in subsection (2)(a), except the commissioner on the governor's staff, are entitled to reimbursement for travel, meals, and lodging while engaged in commission business, as provided in 2-18-501 through 2-18-503.

(4) The commission is attached to the governor's office for administrative purposes only.

History: En. Sec. 4, Ch. 424, L. 1983.

2-15-214. Flathead basin commission — term of appointment — quorum — vacancy — chairman — vote. (1) The commission members shall serve staggered 4-year terms.

(2) A majority of the membership, other than ex officio members, constitutes a quorum of the commission.

(3) A vacancy on the commission must be filled in the same manner as regular appointments, and the member so appointed shall serve for the unexpired term to which he is appointed.

(4) The commission shall select a chairman from among its members. The chairman may make motions and vote.

(5) A favorable vote of at least a majority of all members, except ex officio members, of the commission is required to adopt any resolution, motion, or other decision of the commission.

History: En. Sec. 5, Ch. 424, L. 1983.

EXHIBIT NO. 2

DATE 01/14/85

BILL NO. SB 28

Budget responsibilities of Governor-elect,
17-7-121.

Energy supply emergency powers, Title 90,
ch. 4, part 3.

2-15-202. Repealed. Sec. 32, Ch. 184, L. 1979.

History: En. Sec. 372, Pol. C. 1895; re-en. Sec. 147, Rev. C. 1907; re-en. Sec. 126, R.C.M. 1921; Cal. Pol. C. Sec. 382; re-en. Sec. 126, R.C.M. 1935; R.C.M. 1947, 82-1303.

2-15-203 through 2-15-210 reserved.

2-15-211. Mental disabilities board of visitors — composition — allocation. (1) The governor shall appoint a mental disabilities board of visitors.

(2) The board shall consist of five persons representing but not limited to consumers, doctors of medicine, and the behavioral sciences, at least three of whom may not be professional persons and at least one of whom shall be a representative of an organization concerned with the care and welfare of the mentally ill and one representative of an organization concerned with the care and welfare of the mentally retarded or developmentally disabled. No one may be a member of the board who is a full-time agent or employee of the department of institutions or a mental health facility affected by Title 53, chapter 20, part 1, and chapter 21, part 1, except this prohibition does not affect any employee of a state college or university.

(3) The mental disabilities board of visitors shall be attached to the governor for administrative purposes. It may employ staff for the purpose of carrying out its duties as set out in Title 53, chapter 20, part 1, and chapter 21, part 1.

History: Ap. p. Sec. 30, Ch. 466, L. 1975; amd. Sec. 16, Ch. 546, L. 1977; Sec. 38-1330, R.C.M. 1947; Ap. p. Sec. 32, Ch. 468, L. 1975; amd. Sec. 18, Ch. 546, L. 1977; Sec. 38-1232, R.C.M. 1947; R.C.M. 1947, 38-1232(part), 38-1330(part).

Cross-References

Mental Disabilities Board of Visitors — generally, Title 53, ch. 20, part 1.

Powers and duties, 53-20-104.

2-15-212. Reserved water rights compact commission. (1) There is created a reserved water rights compact commission.

(2) Commissioners are appointed within 30 days of May 11, 1979, as follows:

(a) two members of the house of representatives appointed by the speaker, each from a different political party;

(b) two members of the senate appointed by the president, each from a different political party;

(c) four members designated by the governor; and

(d) one member designated by the attorney general.

(3) Legislative members of the commission are entitled to receive compensation and expenses as provided in 5-2-301 for each day actually spent on commission business. Other members are entitled to salary and expenses as state employees.

(4) The commission is attached to the governor's office for administrative purposes only. The costs of the commission shall be paid from funds appropriated for that purpose from the water right adjudication account established in 85-2-241.

EXHIBIT NO. 2

DATE 011485

FILE NO. SB 28

HOUSE MEMBERS

REX MANUEL
CHAIRMAN
RALPH S. EUDAILY
ROBERT L. MARKS
JOHN VINCENT

SENATE MEMBERS

ALLEN C. KOLSTAD
VICE CHAIRMAN
M. K. DANIELS
PAT M. GOODOVER
CARROLL GRAHAM



Montana Legislative Council

State Capitol
Helena, MT. 59620

(406) 444-3064

DIANA S. DOWLING
EXECUTIVE DIRECTOR
CODE COMMISSIONER
ELEANOR ECK
ADMINISTRATIVE ASSISTANT
MARILYNN NOVAK
DIRECTOR, LEGISLATIVE SERVICES
ROBERT PERSON
DIRECTOR, RESEARCH
SHAROLE CONNELLY
DIRECTOR, ACCOUNTING DIVISION
ROBERT C. PYFER
DIRECTOR, LEGAL SERVICES

November 20, 1984

Judge W. W. Lessley
Chief Judge
Montana Water Courts
Box 879
Bozeman MT 59715

Dear Judge Lessley:

This is to confirm our telephone conversation of November 7, 1984, during which we discussed your reaction to LC 37, the Select Committee on Indian Affairs' proposed bill concerning the Reserved Water Rights Compact Commission.

In our conversation you stated that you were not opposed to the following:

- (1) a two-year extension of the Compact Commission;
- (2) an extension of the filing period for water claims unresolved by the Compact Commission from 60 days after the expiration of the Commission to six months after its expiration; -
- (3) addition to Section 85-2-231(3), MCA, of a statement that the terms of a negotiated compact are included in the preliminary decree "for informational purposes";
- (4) insertion in Section 85-2-234, MCA, of the sentence, "The terms of a compact negotiated and ratified under 85-2-702 must be included in the final decree without alteration.";
- (5) removal of the requirement of Congressional approval of compacts and providing instead for federal approval of compacts only if legally necessary.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2

DATE 01/14/85

BILL NO. SB 28

Judge W. W. Lessley
Page Two
November 20, 1984

Further, you recommended that the Indian Affairs Committee consider including in their bill a provision requiring the Compact Commission to make periodic progress reports to the water courts.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Brenda C Desmond".

Brenda C. Desmond
Staff Attorney

BCD:ee
cc: Select Committee on Indian Affairs

BREND3/ee/Judge Lessley



MONTANA WATER COURTS

STATE OF MONTANA

WATER JUDGES:

Upper Missouri River Basin
Chief Judge W. W. Lessley
P.O. Box 679
Bozeman, MT 59715

December 3, 1984

Lower Missouri River Basin
Judge Bernard W. Thomas
P.O. Box 938
Chinook, MT 59523

Clark Fork River Basin
Judge Robert M. Holter
Lincoln County Courthouse
Libby, MT 59923

Yellowstone River Basin
Judge Roy C. Rodeghiero
P.O. Box 448
Roundup, MT 59072

Brenda Desmond
Staff Attorney
Montana Legislative Council
State Capitol
Helena, MT 59620

Dear Brenda:

Thank you for your confirming letter of
November 20th.

Yours truly,

W.W. Lessley
Chief Water Judge

WWL/jl

4
SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 01/14/85
BILL NO. SB 28

NAME: K. M. Kelly DATE: _____

ADDRESS: 4605 Glass Dr. Helena

PHONE: 453-5861

REPRESENTING WHOM? Mont. Water Development Assn.

APPEARING ON WHICH PROPOSAL: Sen. Bill 28 and 69

DO YOU: SUPPORT? ☒ AMEND? _____ OPPOSE? _____

COMMENT:

Our Assn. supports the concept of extending
the Reserved Rights Commission

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

DATE 011485

BILL NO. SB 28 + SB 69

NAME: Linda Hickman DATE: 1/14/85

ADDRESS: Box 879 Bozeman Mt.

PHONE: 586-4364

REPRESENTING WHOM? Montana Water Courts

APPEARING ON WHICH PROPOSAL: 28 + 69

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? _____

COMMENT: would like to see provision for periodic progress
Reports by the Compact Commission to the Water Court.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 6

DATE 011485

BILL NO. SB 28 + SB 69

(This sheet to be used by those testifying on a bill.)

NAME: Daniel Decker DATE: 1-14-85

ADDRESS: P.O. Box 278 ; Pablo, Mont. 59855

PHONE: (406) 726-3183

REPRESENTING WHOM? Confederated Salish and Kootenai Tribes Tribal Aff

APPEARING ON WHICH PROPOSAL: SB 28469

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 7

DATE 011485

BILL NO. SB 2845B 69

DATE

January 14, 1985

COMMITTEE ON

Judiciary

Senate Bills 28, 56, and 69

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
BOB JAMES	STATE FARM	56	☒	
KARL ENLOW	Mt. Tribe Lawyers	56		☒
John McDonald	FLINT K Grant	28		
Tom L Lewis	Regnier, Lewis & Boland Attorneys	56		☒
R. J. EMMONS	EMMONS COOPER	56	☒	
Clay Smion	AC	28		☒
TOD FURK	MONTANA FCS. OF COUNTIES	28	Information	
BILL ASHER	AGRICULTURAL PRESERVATION ASSN	69	X	
RH Ellis	Mont. Water Development	26 69	☒	
Daniel Decker	Confederated Salish and Kootenai Tribes	28 69	X	
Nim REGNIER	REGNIER & LEWIS	56		☒
Linda Hederman	MT. Water Courts	26 69	X	
K. M. Kelly	Int. Water Dev. Assn	28 69	☒	
T. R. H. Strawn	Mt. Univ System	56-56		
Scott Brown	State of Mont	SB 69		
Marcia Rundle	" " "	SB 69		
Ellen Deake	American Res'n	SB-56	☒	
Harlan Gray	MPLC			
J. Brunner	W. F.E.			
Geo. CICHENSKI	M. E. I. C.	69/26	☒	
Rep Roland Kennedy	Blackfoot Tribe	28/69	☒	

(Please leave prepared statement with Secretary)

27

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

January 16, 1985

The seventh meeting of the Senate Judiciary Committee was called to order at 10:08 a.m. on January 16, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present, with the exception of Senator Daniels, who was excused.

CONSIDERATION OF SB 85: Senator Bob Brown, sponsor of SB 85, stated although criminal justice information is shared informally now, there is no centralized information bank on criminal activity and records, and consequently there is no record of someone's criminal activity in several cities around the state. Nationwide, there are several regional networks like Rocky Mountain Information Network. There is also the National Criminal Information Center which is headquartered in Washington, D.C., which is a repository for criminal information on stolen property and the like. This bill establishes an information section similar to Rocky Mountain Information Network and meets an important law enforcement need. In addition to creating this central location, Senator Brown stated the bill creates an information advisory council under the Attorney General's office. The information files compiled under the provisions of the bill will be reviewed once a year. No information gathered under the bill can be done illicitly. Senator Brown stated the fiscal impact of the bill depends on two additional FTEs the Attorney General has requested in his office. They have the equipment they would need now, but they would need the money to fund the two additional employees..

PROPOSERS: Larry Peterson, of the Montana Board of Crime Control, appeared in support of SB 85 (see written testimony attached as Exhibit 1). Dorothy McCarter, of the Attorney General's office, also appeared in support of the bill. She stated the Criminal Justice Information Act as it presently exists authorizes the Department of Justice to set up an intelligence information section. The purpose of this legislation is to ensure quality control in its collection, storage, and use. The creation of the intelligence information section would not jeopardize any individual's rights to privacy. The information in the intelligence information section is already in the hands of law enforcement agencies. Because the intelligence information section would be providing periodic reviews and audits, the information would be reliable. The Attorney General's office is suggesting the bill be amended (see Exhibit 2).

28

County District Court Clerk, all of whom are in support of this bill. They stated their clerks' association would have been here but for internal problems. Senator Crippen stated he spoke with his clerk, and he is against it. Senator Mazurek was concerned with the forfeiture of office for failure to attend. Senator Yellowtail also declared that was objectionable and probably unconstitutional. Aside from that provision, his clerks were very much in favor of it. Senator Towe stated he was a member of the interim subcommittee that heard this bill. He was also under the impression the clerks' association supported the bill. Senator Crippen stated he believes some clerks will not go. The clerks of district court have meetings in regional areas around the state. Why get them together in Helena when they are getting together around the state. He thinks the idea is great, but the bill misses the mark. He also stated those clerks who have no deputies when they leave must close their doors. Senator Towe stated the justices of the peace have a similar training session, and if they don't attend, they may lose their offices. They also have a justice of the peace association, but the meetings do not cover the type of information needed. He questioned if it would work if you left it on a voluntary basis. Senator Crippen didn't believe we should leave it to the clerks' association to do it, but we should do it for them. Senator Mazurek questioned whether we should do it at all, since we don't do it for other county officials. Senator Towe reiterated that we do it for the justices of the peace. Senator Yellowtail moved that SB 27 be amended in section 1, subsection 3, to delete language in lines 13-15 (see Exhibit 4). The motion passed unanimously. Senator Towe moved that the bill be recommended DC PASS AS AMENDED unless the committee wished to discuss it when all members were present. It was the consensus of those present that action on SB 27 should be withheld until a later time and the motion was withdrawn.

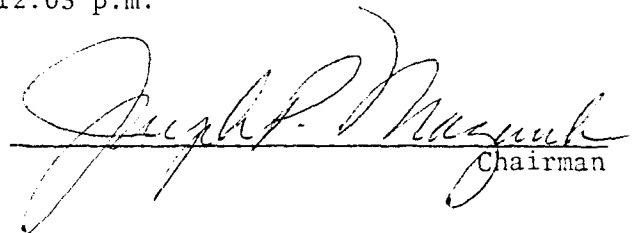
FURTHER CONSIDERATION OF SB 28 AND SB 69: Mr. Petesch presented a grey bill which merges SB 28 and SB 69, which grey bill includes all suggested amendments (see Exhibit 5). Mr. Petesch merged SB 28 into SB 69 because SB 28 contained more sections. He noted the title contains a list of all of the sections, but it does not reflect the content of the bill and will have to be changed. Mr. Petesch then explained the changes made in the bill. Clay Smith, Assistant Attorney General, stated the Attorney General's office has no objection to the overall purpose of either bill. Their only concern deals with the way SB 28 attempts to achieve what they think is a good purpose, which is to make whatever is negotiated and ratified by the legislature binding on the Water Court. He has concerns and has expressed them to Attorney General Greely (who has not yet made up his mind as to his position). The water judge is required to hear challenges and then arrive at a final degree. The water judge does have authority to modify the compacts. When a compact has been negotiated, others may have their rights affected adversely by the compact, and he thinks that is the reason why the

compact is open to challenge by the water court proceedings. Everyone in the office agrees that the possibility of the compact's being modified by the water judge is not a good state of affairs. He believes there are other ways to limit the Water Court's authority to modify compacts. He has proposed language to Mr. Greely that unless a compact is arbitrary and capricious, it cannot be modified. They have not formalized their position, but hope to do so by the end of the week. Senator Crippen asked Mr. Smith to give the committee an example of someone whose water rights would be adversely affected and did not have an opportunity to negotiate in the compact. Mr. Smith explained that in parts of the state where water is scarce, it is conceivable that the reserved rights for the tribes will be substantial and someone could contend that the quantification is too excessive and uses up all of the water for the year, although it is difficult to know the nature of what the challenges may be. Senator Crippen wanted to know if that person whose water rights could be affected would have an opportunity to be involved in the negotiation process or the legislative ratification process. Senator Towe stated that if the United States enters into a treaty with Canada and the treaty is entered into our records for informational purposes, a water judge cannot touch that treaty. He questioned why that doesn't apply to state compacts. Mr. Smith questioned whether the state want to take a chance of subjecting itself to those claims. Senator Towe asked if the legislature finds a compact binding, why would the water judge not be bound by that. Marcia Rundle stated we should be sure the goals of all of the parties are the same. The legislature has provided as an alternative to the water courts a process whereby we could negotiate rather than litigate. Another goal is to protect the integrity of the legislative process. The kinds of due process concerns are the same concerns that have been expressed by the commission. There is no clear answer because there are no cases in which tribes and states have negotiated compacts that have been ratified and subsequently challenged on constitutional grounds. It will be a judgment call by the legislature as to the best means by which we can address those concerns and meet those goals. She believes we should think of a compact as an alternative to the litigation process. Senator Crippen stated the legislature will be hard pressed to overturn a compact. That essentially takes them out of the water adjudication process. Chairman Gordon McOmber stated the legislature cannot on its own change the compact. All it can do is send it back to the commission for further negotiations. Senator Galt stated the commission works very hard to protect the interests of all water users. Chairman Mazurek announced the committee would not take any further action on SB 28 or SB 69 until it has heard from the Attorney General's office.

Senate Judiciary Committee
Minutes of the Meeting
January 16, 1985
Page 6

Senator Galt stated he would be absent from committee meetings Thursday, Friday, and Saturday. He asked that any vote on SB 28 or SB 69 be withheld during his absence. In addition, he asked that he be recorded as having voted for SB 2, SB 3, SB 97, and SB 98 and against SB 27, SB 56, SB 85, and SB 30.

The meeting was then adjourned at 12:05 p.m.


Chairman

SENATE BILL NO. 28

INTRODUCED BY

BY REQUEST OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A 2-YEAR EXTENSION OF THE EXISTENCE OF THE RESERVED WATER RIGHTS COMPACT COMMISSION; PROVIDING FOR FEDERAL APPROVAL OF A COMPACT ONLY IF LEGALLY NECESSARY; REQUIRING THAT THE TERMS OF A COMPACT SET FORTH IN A PRELIMINARY DECREE BE REPRODUCED UNCHANGED IN THE FINAL DECREE; EXTENDING FROM 60 DAYS TO 6 MONTHS THE TIME PERIOD FOR FILING IN THE WATER COURT CLAIMS UNRESOLVED BY THE COMPACT COMMISSION; AMENDING SECTIONS 85-2-217, 85-2-224, 85-2-231, 85-2-234, AND 85-2-702, AND 85-2-704, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-217, MCA, is amended to read:

"85-2-217. Suspension of adjudication. While negotiations for the conclusion of a compact under part 7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights of those tribes and federal agencies which are negotiating are suspended. The obligation to file water rights claims for those reserved rights is also suspended.

This suspension shall be effective until July 1, 1985 1987,

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5DATE 011685BILL NO. SB 28469

32

as long as negotiations are continuing or ratification of a completed compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, ~~1985~~ 1987, the suspension shall terminate on that date. Upon termination of the suspension of this part, the tribes and the federal agencies shall be subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not to negotiate their reserved water rights shall be subject to the full operation of the state adjudication system and may not benefit from the suspension provisions of this section."

SECTION 2. SECTION 85-2-224, MCA, IS AMENDED TO READ:

"85-2-224. Statement of claim. (1) The statement of claim for each right arising under the laws of the state and for each right reserved under the laws of the United States which has been actually put to use shall include substantially the following:

(a) the name and mailing address of the claimant;

(b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;

(c) the quantities of water and times of use claimed;

(d) the legal description, with reasonable certainty,

SENATE JUDICIARY COMMITTEE

1 of the point or points of diversion and places of use of
2 waters;

3 (e) the purpose of use, including, if for irrigation,
4 the number of acres irrigated;

5 (f) the approximate dates of first putting water to
6 beneficial use for the various amounts and times claimed in
7 subsection (c); and

8 (g) the sworn statement that the claim set forth is
9 true and correct to the best of claimant's knowledge and
10 belief.

11 (2) The Any claimant filing a statement of claim under
12 subsection (1) shall submit maps, plats, aerial photographs,
13 decrees, or pertinent portions thereof, or other evidence in
14 support of his claim. All maps, plats, or aerial
15 photographs should show as nearly as possible to scale the
16 point of diversion, place of use, place of storage, and
17 other pertinent conveyance facilities.

18 (3) Any statement of claim for rights reserved under
19 the laws of the United States which have not yet been put to
20 use shall include substantially the following:

21 (a) the name and mailing address of the claimant;

22 (b) the name of the watercourse or water source from
23 which the right to divert or make use of water is claimed,
24 if available;

25 (c) the quantities of water claimed;

SENATE JUDICIARY COMMITTEE

-3-

EXHIBIT NO. 5

SB 28

DATE 011685

BILL NO. SB 28+69

34

1 (d) the priority date claimed;

2 (e) the laws of the United States on which the claim
3 is based; and

4 (f) the sworn statement that the claim set forth is
5 true and correct to the best of claimant's knowledge and
6 belief."

7 Section 3. Section 85-2-231, MCA, is amended to read:

8 "85-2-231. Preliminary decree. (1) The water judge
9 shall issue a preliminary decree. The preliminary decree
10 shall be based on:

11 (a) the statements of claim before the water judge;

12 (b) the data submitted by the department;

13 (c) the contents of compacts approved by the Montana
14 legislature and the tribe or federal agency or, lacking an
15 approved compact, the filings for federal and Indian
16 reserved rights; and

17 (d) any additional data obtained by the water judge.
18 The preliminary decree shall be issued within 90 days after
19 the close of the special filing period set out in
20 85-2-702(3) or as soon thereafter as is reasonably feasible.
21 This section does not prevent the water judge from issuing
22 an interlocutory decree or other temporary decree if such a
23 decree is necessary for the orderly administration of water
24 rights prior to the issuance of a preliminary decree.

25 (2) A preliminary decree may be issued for any

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

-4-

DATE 011685

SB 28

1 hydrologically interrelated portion of a water division,
 2 including but not limited to a basin, subbasin, drainage,
 3 subdrainage, stream, or single source of supply of water, at
 4 a time different from the issuance of other preliminary
 5 decrees or portions of the same decree.

6 (3) The preliminary decree shall contain the
 7 information and make the determinations, findings, and
 8 conclusions required for the final decree under 85-2-234.
 9 The water judge shall include in the preliminary decree, for
 10 informational purposes, the contents of a compact negotiated
 11 under the provisions of part 7 that has been approved by the
 12 legislature and the tribe or federal agency ~~whether--or--not~~
 13 ~~it-has-been-ratified-by-congress~~.

14 (4) If the water judge is satisfied that the report of
 15 the water master meets the requirements for the preliminary
 16 decree set forth in subsections (1) and (3), and is
 17 satisfied with the conclusions contained in the report, the
 18 water judge shall adopt the report as the preliminary
 19 decree. If the water judge is not so satisfied, he may, at
 20 his option, recommit the report to the master with
 21 instructions, or modify the report and issue the preliminary
 22 decree."

23 Section 4. Section 85-2-234, MCA, is amended to read:

24 "85-2-234. Final decree. (1) The water judge shall, on
 25 the basis of the preliminary decree and on the basis of any

SENATE JUDICIARY COMMITTEE

-5- EXHIBIT NO. 5
 DATE 011685
 BILL NO. SB 28+69

SB 28

34

1 hearing that may have been held, enter a final decree
 2 affirming or modifying the preliminary decree. If no
 3 request for a hearing is filed within the time allowed, the
 4 preliminary decree automatically becomes final, and the
 5 water judge shall enter it as the final decree.

6 (2) The terms of a compact negotiated and ratified
 7 under 85-2-702 must be included in the final decree ~~without~~
 8 alteration.

9 ~~(2)~~(3) The final decree shall establish the existing
 10 rights and priorities within the water judge's jurisdiction
 11 of persons required by 85-2-221 to file a claim for an
 12 existing right, ~~and~~ of persons required to file a
 13 declaration of existing rights in the Powder River Basin
 14 pursuant to an order of the department or a district court
 15 issued under sections 8 and 9 of Chapter 452, Laws of 1973,
 16 AND OF ANY FEDERAL AGENCY OR INDIAN TRIBE POSSESSING WATER
 17 RIGHTS ARISING UNDER FEDERAL LAW, REQUIRED BY 85-2-702 TO
 18 FILE CLAIMS.

19 ~~(3)~~(4) The final decree shall state the findings of
 20 fact, along with any conclusions of law, upon which the
 21 existing rights and priorities of each person, FEDERAL
 22 AGENCY, AND INDIAN TRIBE named in the decree are based.

23 ~~(4)~~(5) For each person who is found to have an
 24 existing right ARISING UNDER THE LAWS OF THE STATE OF
 25 MONTANA, the final decree shall state:

SENATE JUDICIARY COMMITTEE

1 (a) the name and post-office address of the owner of
2 the right;

3 (b) the amount of water, rate, and volume, included in
4 the right;

5 (c) the date of priority of the right;

6 (d) the purpose for which the water included in the
7 right is used;

8 (e) the place of use and a description of the land, if
9 any, to which the right is appurtenant;

10 (f) the source of the water included in the right;

11 (g) the place and means of diversion;

12 (h) the inclusive dates during which the water is used
13 each year;

14 (i) any other information necessary to fully define
15 the nature and extent of the right.

16 (6) FOR EACH PERSON, TRIBE, OR FEDERAL AGENCY
17 POSSESSING WATER RIGHTS ARISING UNDER THE LAWS OF THE UNITED
18 STATES, THE FINAL DECREE SHALL STATE:

19 (A) THE NAME AND MAILING ADDRESS OF THE HOLDER OF THE
20 RIGHT;

21 (B) THE SOURCE OR SOURCES OF WATER INCLUDED IN THE
22 RIGHT;

23 (C) THE QUANTITY OF WATER INCLUDED IN THE RIGHT;

24 (D) THE DATE OF PRIORITY OF THE RIGHT;

25 (E) THE PURPOSE FOR WHICH THE WATER INCLUDED IN THE

SENATE JUDICIARY COMMITTEE

-7- BILL NO. 5

011685
BILL NO. SB 28464

SB 28

38

1 RIGHT IS CURRENTLY USED, IF AT ALL;

2 (F) THE PLACE OF USE AND A DESCRIPTION OF THE LAND, IF
 3 ANY, TO WHICH THE RIGHT IS APPURTENANT;

4 (G) THE PLACE AND MEANS OF DIVERSION, IF ANY;

5 (H) ANY OTHER INFORMATION NECESSARY TO FULLY DEFINE
 6 THE NATURE AND EXTENT OF THE RIGHT, INCLUDING THE TERMS OF
 7 ANY COMPACTS NEGOTIATED AND RATIFIED UNDER 85-2-702."

8 Section 5. Section 85-2-702, MCA, is amended to read:

9 "85-2-702. Negotiation with Indian tribes. (1) The
 10 reserved water rights compact commission, created by
 11 2-15-212, may negotiate with the Indian tribes or their
 12 authorized representatives jointly or severally to conclude
 13 compacts authorized under 85-2-701. Compact proceedings
 14 shall be commenced by the commission. The commission shall
 15 serve by certified mail directed to the governing body of
 16 each tribe a written request for the initiation of
 17 negotiations under this part and a request for the
 18 designation of an authorized representative of the tribe to
 19 conduct compact negotiations. Upon receipt of such written
 20 designation from the governing body of a tribe, compact
 21 negotiations shall be considered to have commenced, EXCEPT
 22 THAT NO COMPACT PROCEEDINGS MAY COMMENCE AFTER JULY 1, 1985.

23 (2) When the compact commission and the Indian tribes
 24 or their authorized representatives have agreed to a
 25 compact, they shall sign a copy and file an original copy

SENATE JUDICIARY COMMITTEE

1 with the department of state of the United States of America
 2 and copies with the secretary of state of Montana and with
 3 the governing body for the tribe involved. The compact is
 4 effective and binding upon all parties upon ratification by
 5 the legislature of Montana, AND any affected tribal
 6 governing body, ~~--and, if legally necessary, the congress of~~
 7 ~~the United States or other appropriate federal authority.~~

8 (3) Upon its approval RATIFICATION by the Montana
 9 legislature and the tribe ~~or federal agency~~, the terms of a
 10 compact must be included in the preliminary decree for
 11 informational purposes as provided by 85-2-231, and unless
 12 renegotiated, the terms of the compact must be included in
 13 the final decree without alteration. However, if approval of
 14 the state legislature and tribe ~~or federal agency~~ has not
 15 been accomplished by July 1, 1985 1987, all federal ~~--and~~
 16 Indian claims for reserved water rights that have not been
 17 resolved by a compact must be filed with the department
 18 within ~~60 days~~ 6 months. These new filings shall be used in
 19 the formulation of the preliminary decree and shall be given
 20 treatment similar to that given to all other filings."

21 SECTION 6. SECTION 85-2-704, MCA, IS AMENDED TO READ:

22 "85-2-704. Termination of negotiations. (1) The
 23 commission or any other ~~---party---to---the---negotiations~~
 24 negotiating tribe or federal agency may terminate
 25 negotiations by providing notice to all parties 30 days in

SENATE JUDICIARY COMMITTEE

-9- REPORT NO. 5
 DATE 011685
 BILL NO. SB 28 + 69

SB 28

LD

1 advance of the termination date. On the termination date,
 2 the suspension of the application of part 2 provided for in
 3 85-2-217 shall also terminate. The tribe or federal agency
 4 shall file all of its claims for reserved rights within 60
 5 days of the termination of negotiations.

6 (2) (a) However, if a notice of termination is
 7 submitted by either party and the submitting party elects to
 8 retract the notice before the termination date, the notice
 9 of termination must be disregarded and negotiations are not
 10 terminated. The retraction of a notice of termination must
 11 be made by certified mail addressed to:

12 (i) the chairman of the governing body of the affected
 13 tribe;

14 (ii) the officially designated representative of the
 15 affected federal agency; or

16 (iii) the chairman of the reserved water rights compact
 17 commission.

18 (b) The retraction of a notice of termination must be
 19 received before the termination date."

20 THERE IS A NEW MCA SECTION THAT READS:

21 NEW SECTION. Section 7. Status reports to chief water
 22 judge. (1) The Montana reserved water rights compact
 23 commission must submit to the chief water judge, appointed
 24 pursuant to 3-7-221, a report on the status of its
 25 negotiations on July 1, 1985, and every 6 months thereafter.

SENATE JUDICIARY COMMITTEE

1 (2) Each report must state which Indian tribes and
2 federal agencies are engaged in negotiations, whether any
3 negotiations with Indian tribes or federal agencies have
4 been terminated, and the progress of negotiations on a
5 tribe-by-tribe and agency-by-agency basis. The report must
6 be made available to the public.

7 NEW SECTION. Section 8. Effective date. This act is
8 effective ~~on-passage-and-approval~~ JULY 1, 1985.

-End-

SENATE JUDICIARY COMMITTEE

-11-

LETTER NO. 5
DATE 01/16/85
BILL NO. SB 28 + 69

SB 28

48

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

February 13, 1985

The twenty-eighth meeting of the Senate Judiciary Committee was called to order at 10:08 a.m. on February 13, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

Chairman Mazurek announced that due to the great deal of input and interest in SB 28 and SB 69, the bills would be reheard before the committee. He asked that those testifying limit their testimony to comments concerning the amendments presented and new issues raised.

The following exhibits were distributed to the committee and entered into the record of the hearing: AG's proposed amendments to grey bill (Exhibit A); proposed attorney general's revisions to grey bill version of SB 28 and explanation (Exhibit B); Reid Chambers' proposed amendment to grey bill (Exhibit C); and attorney general's redrafted version of Reid Chambers' proposed amendments to grey bill (Exhibit D).

FURTHER CONSIDERATION OF SB 28 AND SB 69: Senator Dorothy Eck, sponsor of SB 28, testified that of all of the recommendations that have been made, the one she would prefer would be to go back to her original bill, extend the date, and not make any other changes. She believes the Chambers' amendment (Exhibit C) offers the best solution of addressing some of the problems the committee has raised. She hopes the amendments will allow the process to go on in an orderly way.

Senator Jack Galt, sponsor of SB 69, testified this bill was introduced at the request of the Reserved Water Rights Compact Commission. The bill makes the commission report to the water court judge to keep him informed of whatever compacts it is negotiating and to keep him informed. It also extends the commission's authority to July 1, 1987. Finally, the bill deals with termination of negotiations. Senator Galt hoped the committee would grant the extension or he believed the state of Montana would be getting into some extensive litigation.

PROPONENTS: Caleb Shields, Member, Tribal Executive Board, Assiniboine and Sioux Tribes of the Fort Peck Reservation, presented written testimony in support of the two bills (Exhibit 1). Richard Whitesell, Area Director, Billings Area, Bureau of Indian Affairs, presented written testimony in support of the bills (Exhibit 2). Daryl Wright, Water

Senate Judiciary Committee
Minutes of the Meeting
February 13, 1985
Page 2

Rights Coordinator, Chippewa Cree Tribe of the Rocky Boy's Reservation, entered into the record a resolution from the tribe dated December 20, 1984, supporting an extension of the Water Rights Compact Commission (Exhibit 3). He testified that although they are not happy about having to negotiate any tribal rights with the state of Montana, they have entered into these negotiations to preserve their rights. They have not yet reached the stage where they are close to a compact, but they do feel progress is being made in that direction. They believe the only alternative to negotiation is litigation. The Wind River litigation at last report has exceeded \$7 million. He does not believe either the state or the tribes want to expend the vast amount of resources necessary to reach that settlement. He urged the committee to support the proposed extension and stated the tribe agreed with Mr. Shields' amendments. Dan Decker, Confederated Salish and Kootenai Tribes, presented written testimony to the committee (Exhibit 4). He testified the merits of negotiation over litigation have already been presented to the committee. Joe McKay, Blackfeet Tribe of Montana, testified they believe this is the first time they have participated in proceedings of this kind with regard to their water. They support the extension of the commission and believe it is an act of good faith. They do not think negotiations should ever be foreclosed as an avenue of resolving the critical water rights issue. They do not support the deadline of commencement of negotiations for either July 1, 1985, or January 1, 1986, as that provision at this particular point of time would affect only the Blackfoot Tribe. Mr. McKay believes this is a very emotional issue. Emotions are always the highest on the reservation and in the communities surrounding the reservation. They feel it is essential to be able to strip away the emotional arguments and make this decision against the factual and legal background. He believes setting a deadline as proposed here would be seen as an aggressive act and injure any ability of bringing their tribe to the negotiation table. They believe the hammer of litigation is sufficient, and the legislature doesn't need to set over their heads the sword of a deadline. They support the elimination of a requirement for congressional ratification of an agreement. They support the amendments by Senator Eck which provide for a negotiated compact to be included in a preliminary decree for informational purposes only and included in the final decree without challenge. They do not think the state should impose upon them artificial or arbitrary deadlines for negotiations. In summation, Mr. McKay stated the deadlines should be eliminated and the compact commission's life extended. Clay Smith, Assistant Attorney General, testified on behalf of the Attorney General in connection with the bills and submitted written testimony (Exhibit 5). He stated that with the revisions submitted with their testimony, their office fully supports both bills. They think it is essential that the life of the commission be extended, as the commission is making headway with not only the Fort Peck Tribe but with other tribes as well. It is also making headway with those federal

agencies with which it is negotiating. Mona Jamison, Legal Counsel to the Governor, stated they support enthusiastically both bills and the amendments proposed by the Attorney General's office. They support the extension. They think it is critical to the state. First, because the compact commission has been making tremendous headway. They feel the extension fosters a spirit of cooperation. The amount of money that is saved if we are able to achieve compacts is a tremendous savings to the state. The due process issue that has been raised in SB 28 does concern them, and, therefore, they support the amendment as proposed by Mr. Chambers. They are concerned with the language "for informational purposes only." They strongly urge passage of the bills with the Attorney General's amendments. Cal Wilson, Tribal Attorney, Northern Cheyenne Tribe, testified they like both bills. They have followed and studied them. They stressed that the testimony from the other tribes is the same as what they would like to offer. They think these bills would make this law and the process go along a lot better. They don't see the due process problems the Attorney General does. Louie Clayborn, Coordinator of Indian Affairs, submitted written testimony (Exhibit 6). Gary Kimble, Attorney and staff person in Mr. Clayborn's office, stated they have discussed the perceived problem of due process. They see problems with the Attorney General's amendments and with Mr. Chambers' amendment. He believes what you have is a defect in the state administration of water rights in Montana. When you are signing a compact with an Indian tribe, you are recognizing Indians have rights for present and future purposes. The water wasn't the state's to give away to begin with. When you put it in the final decree, you are recognizing the tribes have certain water rights regardless of whether they are using them. You have a method of trying to eliminate the defect and still have a compact. You have to decide what kind of challenge you are going to make. Mr. Chambers has one method of eliminating the defect. What you don't want to have is the Indians carrying the burden of the state's mistake. It was the state's mistake to allow users to dip into the reserved rights. If the state is going to include descriptions of Indian water rights, it can do it in such a way without affecting the litigation before the state supreme court. Philip Roy, Attorney, Blackfoot Tribe, testified they adamantly support the extension and oppose any deadlines for the start of negotiations. He believes it would be a show of good faith on the part of Montana to grant the extension and clean up the bills and keep any deadlines out of the bills. Jo Brunner, representing W.I.F.E., testified they support SB 69 (see witness sheet attached as Exhibit 7).

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: Senator Towe asked Mr. Decker to clarify his position on the Chambers' amendment. Mr. Decker stated his written

statement submitted to the committee was submitted before they saw the Chambers' amendment. He stated the Confederated Tribes still support the compact's being entered into the final decree without challenge. Senator Mazurek asked Mr. Smith to explain their proposed modifications to the Chambers' amendment. Mr. Smith stated it was an attempt to clarify the proposal and to streamline it. There was no change in intent as that was not their purpose. They felt the proposal was awkward.

Senator Pinsoneault addressed Mr. McKay and stated his tribe's involvement in this matter added a new dimension. He stated that when Representative Kennerly testified at the original hearing on these bills, he stated the Blackfoot Tribal Council is replaced every two years en masse. Mr. McKay stated that is theoretically possible. Senator Pinsoneault asked if they are asking for additional time and the council is replaced every two years it would be hard to bring this issue to a new body and have them fully understand it. Mr. McKay stated what they are asking for is time not to educate the council, but time to educate the entire tribe. Then, if there were a turnover of people on the council, the new members would not be as uninformed as they have been in the past. Senator Pinsoneault asked what sort of an extension they were talking about. Mr. McKay responded their suggestion is there be no deadline whatsoever for commencement of negotiations. Senator Blaylock asked Mr. McKay if he were adamant there be no deadline and if it were a possibility his tribe would never negotiate. Mr. McKay responded yes, and that is a possibility. He explained they are asking for two things: (1) The opportunity to provide some community education; and (2) the opportunity to look closely at the issue and determine if there is anything to be gained from negotiations.

Senator Towe asked Mr. Smith to explain his modification to the Chambers' amendment as it appears to contain some substantial differences. Mr. Smith stated he believes the only changes they have made are nonsubstantive in nature. Senator Towe stated their changes injected preponderance of the evidence while the original proposal was beyond a reasonable doubt. Mr. Smith stated the Attorney General's suggestion was different from Mr. Chambers'. He believes without any further reference to burden of proof, the burden of proof under the Chambers' amendment would be that applicable to any other challenge in water proceedings. Senator Towe stated there is no reference in the Attorney General's changes to the burden of proof. He asked why they didn't include the burden of proof concept in their rewrite. Mr. Smith responded he believes the term preponderance of the evidence is equivalent to burden of proof. Senator Towe stated the Attorney General's changes did not pick up the statement Mr. Chambers made that the compact provisions shall be considered prima facie valid in all subsequent litigation before the water judge. Mr. Smith stated that is implicit and did not need reiteration.

47

Senator Mazurek stated he discussed that particular sentence with Mr. Chambers when this was proposed, and he did not feel strongly about it.

Senator Towe asked Mr. Smith what basis for objection can be sustained here or what objection are you permitting someone to come in and make to overthrow the compact. Mr. Smith stated it is his opinion that objections to a compact must be fairly limited in nature (quantification or use of water rights). Senator Towe stated it did not say that in the rewrite. Mr. Smith responded he doesn't believe the Chambers' proposal or the redraft of it are limited in nature. They believe the availability of substantive challenges are essential. Senator Towe asked Mr. Kimble and Mr. Decker if they were satisfied with the Attorney General's rewrite. Mr. Decker stated they eliminated the prima facie evidence of the claims from the compact. The language change of the burden of proof by the Attorney General submitted preponderance of the evidence. They would prefer substantial evidence rather than preponderance, as preponderance is not as high a standard. Senator Towe asked about substantive objections to the compact rather than procedural objections. He asked if they are willing to let it stand with that language in the proposal. Mr. Decker stated they would prefer the Chambers' amendment to the Attorney General's. Mr. Kimble stated they had no problem with the whole problem of preliminary versus final decree, although it appears you are eliminating the compact process. He believes either you sign an agreement which is binding upon the parties or you don't. He liked the Chambers' amendment because that creates a prima facie status as to the position of the water users. Mr. Kimble stated one of the problems he has is either you are negotiating or not. Senator Towe asked if he would object to the right to bring any substantive objections. Mr. Kimble stated as a compromise, he thinks Mr. Chambers has a good one.

Senator Mazurek stated there seems to be general agreement on the evidence, general agreement a deadline is not favored, and general agreement progress reports to the judge are appropriate. He stated Mr. Decker and Mr. Kimble have raised the question with respect to the filing requirements for persons who would claim reserved rights. Senator Mazurek asked Mr. Decker if he proposed technical modifications of that or if he objected to including that at all. Mr. Decker stated the thing that is troublesome about that provision is there was a separation between federal reserved waters in use and those not put to use. You cannot lose reserved water rights through non-use, so there should be a route for a holder of a reserved right to file a claim, but you should not have to find law to make that claim or show it is water that is in use or not. He objected to categorizing the reserved water rights into those being used and those not being used. Senator Towe stated if you have a federal claim, they are asking on what basis the federal exemption is requested. Mr. Decker stated if the state is going to recognize the reserved rights doctrine, then that should cover it.

48

Senate Judiciary Committee
Minutes of the Meeting
February 13, 1985
Page 6

Senator Mazurek stated the existing law is unclear as to what the water court could do with a compact before it. The concern he has heard expressed is if we do not change this somehow, we will have a worse situation than if we make some amendments. Mr. Kimble stated he would agree that this is the best you can do, because you do have a defect.

Senator Towe stated Mr. Whitesell's statement makes it very clear his department's view is that the compact should not be overturned once entered into in its course through the courts. That in effect is some indication or expression that there shouldn't be any allowance of objection. Mr. Whitesell stated he cannot speak to the legal views we have been speaking to. He would have his attorney review it and submit testimony. (The testimony was later received and is attached as Exhibit 8.)

Further consideration of SB 28 and SB 69 was closed.

CONSIDERATION OF HB 13: Representative Roland Kennerly, sponsor of HB 13, stated he carried HB 13 at the request of the Select Committee of Indian Affairs. He testified it is a housekeeping bill cleaning up some language in the state-tribal cooperative agreements law. The main thing of the bill was under the past law, these agreements had to be approved by the Attorney General and the Governor. The Governor's office reviewed the bill and concurred that they felt approval of the Attorney General would be sufficient.

PROPOSERS: Louie Clayborn, Coordinator of Indian Affairs for the State of Montana, presented written testimony in support of the bill (Exhibit 9). Dan Decker, on behalf of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, stated he would generally like to express their support for HB 13.

OPPOSERS: None.

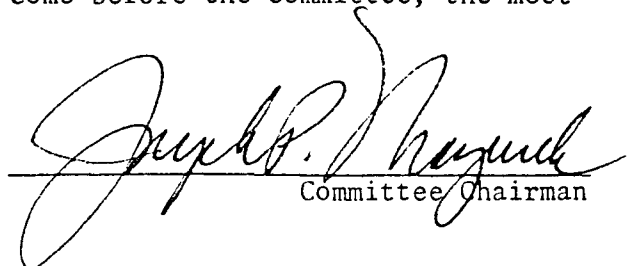
QUESTIONS FROM THE COMMITTEE: None.

CLOSING STATEMENT: None.

Hearing on HB 13 was closed.

ACTION ON HB 13: Senator Towe moved that HB 13 be recommended BE CONCURRED IN. The motion carried unanimously.

There being no further business to come before the committee, the meeting was adjourned at 11:40 a.m.


Committee Chairman

ROLL CALL

SENATE JUDICIARY

COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 02/13

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt	X		
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe	X		
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels	X		
Chairman Senator Joe Mazurek	X		

AG'S PROPOSED AMENDMENTS TO GREY BILL:

1. Page 5, lines 9 and 10.

Following: "decree"

Strike: remainder of line 9 through "purposes" on line 10

2. Page 6, lines 6 and 7.

Following: "(2)"

Strike: remainder of line 6 through "decree" on line 7

Insert: "The final decree shall set forth the terms of any compact included in the preliminary decree without change unless, as to any matter referred to in subsection (6), the water judge: (a) finds that a proper challenge to such matter was made under 85-2-233; and (b) determines beyond a reasonable doubt that no substantial factual or legal basis exists for the term of the compact to which the challenge is made."

3. Page 6, line 16.

Following: "ANY"

Strike: remainder of line 16 in its entirety

Insert: "person's"

4. Page 6, lines 21 and 22.

Following: "person"

Strike: remainder of line 21 through "TRIBE" on line 22

5. Page 7, line 16.

Following: "PERSON"

Strike: remainder of line 16 in its entirety

6. Page 9, line 5.

Following: "Montana"

Strike: "AND"

Insert: ", "

7. Page 9, line 7.

Following: "authority"

Insert: "the secretary of the interior or his authorized representative, and if required by the terms of the compact, the congress of the United States"

8. Page 9, line 9.

Following: "agency,"

Insert: "and approval by the secretary of the interior or his authorized representative,"

9. Page 9, lines 10 and 11.

Following: "decree"

Strike: remainder of line 10 through "purposes" on line 11

10. Page 9, lines 11 through 13.

Following: "85-2-231"

Strike: remainder of line 11 through "alteration" on line 13

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. A

DATE 02/3/85

BILL NO. SBs 28+69

11. Page 9, line 14.

Following: "legislature"

Strike: "and"

Insert: ", the"

Following: "tribe"

Insert: ", "

Following: "agency"

Insert: "and the secretary of the interior or his authorized representative"

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. A

DATE 021385

BILL NO. SBs 28+69

PROPOSED ATTORNEY GENERAL'S REVISIONS
TO GREY BILL VERSION OF SENATE BILL NO. 28
AND EXPLANATION

Attached are the Attorney General's proposed revisions to the grey bill version of Senate Bill No. 28. There are eight proposed revisions whose locations are noted by corresponding numerical entries in the right margin.

1. Revision No. 1. Revision No. 1 deletes the words "for informational purposes" from the proposed amendment to section 85-2-231(3), MCA. The effect of the Senate Bill No. 28 amendment, if adopted without this office's suggested revision, is to deny affected non-reserved water right users any opportunity to challenge the quantification, use or priority date provisions of a ratified compact which they believe adversely affect them. We have concluded due process requires that such persons be given an opportunity to be heard in connection with any such objection, and the present challenge provisions in section 85-2-233, MCA, afford such opportunity. A failure to allow any opportunity for challenge, moreover, may well undercut the binding nature of the associated final decrees and

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. B
DATE 02/385
BILL NO. SBs 28+69

43

thereby prejudice the entire general adjudicatory process.

2. Revision No. 2. Our second suggested revision involves deletion of the entirety of Senate Bill No. 28's proposed amendment to section 85-2-234(2), MCA. Senate Bill No. 28's proposed amendment to that subsection presently reads: "The terms of the compact negotiated and ratified under 85-2-702 must be included in the final decree." This proposed amendment by Senate Bill No. 28 must be read in connection with the proposed amendment to section 85-2-231(3), MCA, discussed above and makes clear that the Water Court has no authority to modify the terms of a ratified compact.

The purpose of Senate Bill No. 28's proposed amendment to section 85-2-234(2), MCA, is to make binding on the Water Court and all affected non-reserved water right users the terms of a ratified compact. This office agrees that the Water Court's authority to modify ratified compacts should be strictly restricted so as to make the negotiation process itself meaningful. Nonetheless, for those reasons discussed above, we believe due process required notice to affected non-reserved water right users and an opportunity to object. Our suggested revision is intended to address both the concern that ratified compacts be accorded great weight in the final decree process and the need to allow water users the opportunity to raise challenges.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. B
DATE 021385

3. Revisions Nos. 3, 4, and 5. These suggested revisions are technical and involve only the deletion of the words "federal agency or tribe" from the grey bill's proposed section 85-2-234(3) and (4), MCA, and the words "tribe or federal agency" from section 85-2-234(6), MCA. We suggest these changes because the term "person" as presently defined in section 85-2-102(10), MCA, includes tribes and agencies of the United States, and there is consequently no need to mention those entities separately.

4. Revisions Nos. 6 and 7. Our suggested revisions add the words "the secretary of the interior or his authorized representative and, if required by the terms of the compact" to section 85-2-702(2), MCA, of the grey bill and are technical in nature. Because Senate Bill No. 28 proposes to remove congressional approval as a condition to a binding compact, we believe approval by the secretary of the interior is necessary since the United States, as a legal matter, holds the involved water rights in trust for the tribes. We further believe that, under some circumstances, the parties to a compact may want one or more of its provisions to be ratified by congress and have thus added a provision in contemplation of such possibility.

5. Revision No. 8. Our suggested revision deletes the words "for informational purposes" from lines 10 and 11 and the words "and unless renegotiated,

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B

DATE 021385

BILL NO. SBs 28+69

the terms of the compact must be included in the final decree without alteration" from lines 11 through 13 of the grey bill. The suggested revision also adds the words "and approval by the secretary of the interior or his authorized representative." The reason for the deletion is the due process concern discussed in connection with our suggested revisions to sections 85-2-231(3) and 85-2-234(2), MCA, of Senate Bill No. 28. We propose the additional wording for the same reasons discussed in connection with our suggested revision to section 85-2-702(2), MCA.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. B
DATE 02/3/85
BILL NO. SBs 28 + 69

ATTORNEY GENERAL'S
PROPOSED REVISIONS

SENATE BILL NO. 28

INTRODUCED BY

BY REQUEST OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A 2-YEAR
EXTENSION OF THE EXISTENCE OF THE RESERVED WATER RIGHTS
COMPACT COMMISSION; PROVIDING FOR FEDERAL APPROVAL OF A
COMPACT ONLY IF LEGALLY NECESSARY; REQUIRING THAT THE TERMS
OF A COMPACT SET FORTH IN A PRELIMINARY DECREE BE REPRODUCED
UNCHANGED IN THE FINAL DECREE; EXTENDING FROM 60 DAYS TO 6
MONTHS THE TIME PERIOD FOR FILING IN THE WATER COURT CLAIMS
UNRESOLVED BY THE COMPACT COMMISSION; AMENDING SECTIONS
85-2-217, 85-2-224, 85-2-231, 85-2-234, AND 85-2-702, AND
85-2-704, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-217, MCA, is amended to read:

"85-2-217. Suspension of adjudication. While
negotiations for the conclusion of a compact under part 7
are being pursued, all proceedings to generally adjudicate
reserved Indian water rights and federal reserved water
rights of those tribes and federal agencies which are
negotiating are suspended. The obligation to file water
rights claims for those reserved rights is also suspended.

This suspension shall be effective until July 1, 1985.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. BDATE 02/13/85SBs 28 & 69
MONTANA LEGISLATIVE COUNCIL

as long as negotiations are continuing or ratification of a completed compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, ~~1985~~ 1987, the suspension shall terminate on that date. Upon termination of the suspension of this part, the tribes and the federal agencies shall be subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not to negotiate their reserved water rights shall be subject to the full operation of the state adjudication system and may not benefit from the suspension provisions of this section."

SECTION 2. SECTION 85-2-224, MCA, IS AMENDED TO READ:

"85-2-224. Statement of claim. (1) The statement of claim for each right arising under the laws of the state and for each right reserved under the laws of the United States which has been actually put to use shall include substantially the following:

(a) the name and mailing address of the claimant;

(b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;

(c) the quantities of water and times of use claimed;

(d) the legal description, with reasonable certainty,

SENATE JUDICIARY COMMITTEE

-2- EXHIBIT NO. B
DATE 021385

1 of the point or points of diversion and places of use of
2 waters;

3 (e) the purpose of use, including, if for irrigation,
4 the number of acres irrigated;

5 (f) the approximate dates of first putting water to
6 beneficial use for the various amounts and times claimed in
7 subsection (c); and

8 (g) the sworn statement that the claim set forth is
9 true and correct to the best of claimant's knowledge and
10 belief.

11 (2) The Any claimant filing a statement of claim under
12 subsection (1) shall submit maps, plats, aerial photographs,
13 decrees, or pertinent portions thereof, or other evidence in
14 support of his claim. All maps, plats, or aerial
15 photographs should show as nearly as possible to scale the
16 point of diversion, place of use, place of storage, and
17 other pertinent conveyance facilities.

18 (3) Any statement of claim for rights reserved under
19 the laws of the United States which have not yet been put to
20 use shall include substantially the following:

21 (a) the name and mailing address of the claimant;

22 (b) the name of the watercourse or water source from
23 which the right to divert or make use of water is claimed,
24 if available;

25 (c) the quantities of water claimed;

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. B
DATE 021385
BILL NO. SBs 28469

1 (d) the priority date claimed;

2 (e) the laws of the United States on which the claim
3 is based; and

4 (f) the sworn statement that the claim set forth is
5 true and correct to the best of claimant's knowledge and
6 belief."

7 Section 3. Section 85-2-231, MCA, is amended to read:

8 "85-2-231. Preliminary decree. (1) The water judge
9 shall issue a preliminary decree. The preliminary decree
10 shall be based on:

11 (a) the statements of claim before the water judge;

12 (b) the data submitted by the department;

13 (c) the contents of compacts approved by the Montana
14 legislature and the tribe or federal agency or, lacking an
15 approved compact, the filings for federal and Indian
16 reserved rights; and

17 (d) any additional data obtained by the water judge.
18 The preliminary decree shall be issued within 90 days after
19 the close of the special filing period set out in
20 85-2-702(3) or as soon thereafter as is reasonably feasible.
21 This section does not prevent the water judge from issuing
22 an interlocutory decree or other temporary decree if such a
23 decree is necessary for the orderly administration of water
24 rights prior to the issuance of a preliminary decree.

25 (2) A preliminary decree may be issued for any

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B

-4-

DATE 021385

SB 28

1 hydrologically interrelated portion of a water division,
 2 including but not limited to a basin, subbasin, drainage,
 3 subdrainage, stream, or single source of supply of water, at
 4 a time different from the issuance of other preliminary
 5 decrees or portions of the same decree.

6 (3) The preliminary decree shall contain the
 7 information and make the determinations, findings, and
 8 conclusions required for the final decree under 85-2-234.
 9 The water judge shall include in the preliminary decree.

10 the contents of a compact negotiated
 11 under the provisions of part 7 that has been approved by the
 12 legislature and the tribe or federal agency whether--or--not
 13 it-has-been-ratified-by-congress.

14 (4) If the water judge is satisfied that the report of
 15 the water master meets the requirements for the preliminary
 16 decree set forth in subsections (1) and (3), and is
 17 satisfied with the conclusions contained in the report, the
 18 water judge shall adopt the report as the preliminary
 19 decree. If the water judge is not so satisfied, he may, at
 20 his option, recommit the report to the master with
 21 instructions, or modify the report and issue the preliminary
 22 decree."

23 Section 4. Section 85-2-234, MCA, is amended to read:

24 "85-2-234. Final decree. (1) The water judge shall, on
 25 the basis of the preliminary decree and on the basis of any

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B

-5- DATE 621385

SB 28

BILL NO. SBS 28+69

101

1 hearing that may have been held, enter a final decree
 2 affirming or modifying the preliminary decree. If no
 3 request for a hearing is filed within the time allowed, the
 4 preliminary decree automatically becomes final, and the
 5 water judge shall enter it as the final decree.

6 (2) The final decree shall set forth the terms of any
 7 compact included in the preliminary decree without change
 8 unless, as to any matter referred to in paragraph (6) below,
 9 the water judge (1) finds that a proper challenge to such
 10 matter was made under 85-2-233 and (2) determines beyond a
 11 reasonable doubt that no substantial factual or legal basis
 12 exists for the term of the compact to which the challenge is
 13 made.

14 (3) The final decree shall establish the existing
 15 rights and priorities within the water judge's jurisdiction
 16 of persons required by 85-2-221 to file a claim for an
 17 existing right, and of persons required to file a
 18 declaration of existing rights in the Powder River Basin
 19 pursuant to an order of the department or a district court
 20 issued under sections 8 and 9 of Chapter 452, Laws of 1973,

21 AND OF ANY PERSON POSSESSING WATER
 22 RIGHTS ARISING UNDER FEDERAL LAW, REQUIRED BY 85-2-702 TO
 23 FILE CLAIMS.

24 (4) The final decree shall state the findings of
 25 fact, along with any conclusions of law, upon which the
 26 existing rights and priorities of each person
 27 named in the decree are based.

28 (5) For each person who is found to have an
 29 existing right ARISING UNDER THE LAWS OF THE STATE OF
 30 MONTANA, the final decree shall state:

SENATE JUDICIARY COMMITTEE

EXHIBIT NO.

B

DATE 021385

1 (a) the name and post-office address of the owner of
2 the right;

3 (b) the amount of water, rate, and volume, included in
4 the right;

5 (c) the date of priority of the right;

6 (d) the purpose for which the water included in the
7 right is used;

8 (e) the place of use and a description of the land, if
9 any, to which the right is appurtenant;

10 (f) the source of the water included in the right;

11 (g) the place and means of diversion;

12 (h) the inclusive dates during which the water is used
13 each year;

14 (i) any other information necessary to fully define
15 the nature and extent of the right.

16 (6) FOR EACH PERSON

17 POSSESSING WATER RIGHTS ARISING UNDER THE LAWS OF THE UNITED
18 STATES, THE FINAL DECREE SHALL STATE:

19 (A) THE NAME AND MAILING ADDRESS OF THE HOLDER OF THE
20 RIGHT;

21 (B) THE SOURCE OR SOURCES OF WATER INCLUDED IN THE
22 RIGHT;

23 (C) THE QUANTITY OF WATER INCLUDED IN THE RIGHT;

24 (D) THE DATE OF PRIORITY OF THE RIGHT;

25 (E) THE PURPOSE FOR WHICH THE WATER INCLUDED IN THE

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B

DATE 021385

12-78-19

SB 28

1 RIGHT IS CURRENTLY USED, IF AT ALL;

2 (F) THE PLACE OF USE AND A DESCRIPTION OF THE LAND, IF
3 ANY, TO WHICH THE RIGHT IS APPURTENANT;

4 (G) THE PLACE AND MEANS OF DIVERSION, IF ANY;

5 (H) ANY OTHER INFORMATION NECESSARY TO FULLY DEFINE
6 THE NATURE AND EXTENT OF THE RIGHT, INCLUDING THE TERMS OF
7 ANY COMPACTS NEGOTIATED AND RATIFIED UNDER 85-2-702."

8 Section 5. Section 85-2-702, MCA, is amended to read:

9 "85-2-702. Negotiation with Indian tribes. (1) The
10 reserved water rights compact commission, created by
11 2-15-212, may negotiate with the Indian tribes or their
12 authorized representatives jointly or severally to conclude
13 compacts authorized under 85-2-701. Compact proceedings
14 shall be commenced by the commission. The commission shall
15 serve by certified mail directed to the governing body of
16 each tribe a written request for the initiation of
17 negotiations under this part and a request for the
18 designation of an authorized representative of the tribe to
19 conduct compact negotiations. Upon receipt of such written
20 designation from the governing body of a tribe, compact
21 negotiations shall be considered to have commenced, EXCEPT
22 THAT NO COMPACT PROCEEDINGS MAY COMMENCE AFTER JULY 1, 1985.

23 (2) When the compact commission and the Indian tribes
24 or their authorized representatives have agreed to a
25 compact, they shall sign a copy and file an original copy

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. B

DATE 021385

1 with the department of state of the United States of America
 2 and copies with the secretary of state of Montana and with
 3 the governing body for the tribe involved. The compact is
 4 effective and binding upon all parties upon ratification by
 5 the legislature of Montana, any affected tribal
 6 governing body, and the Secretary of the Interior or his
 7 authorized representative and, if required by the terms of
the compact, the congress of the United States.

8 (3) Upon its ~~approval~~ RATIFICATION by the Montana
 9 legislature and the tribe ~~or federal agency~~, and approval by
 10 the Secretary of the Interior or his authorized
 11 representative, the terms of a compact must be included in
 12 the preliminary decree as provided by 85-2-231. However, if
 13 approval of the state legislature, and the tribe or federal
 14 agency and the Secretary of the Interior or his authorized
 15 representative has not been accomplished by July 1, ~~1985~~
 16 1987, all ~~federal-and~~ Indian claims for reserved water rights
 17 that have not been resolved by a compact must be filed with
 18 the department within ~~60-days~~ 6 months. These new filings
 19 shall be used in the formulation of the preliminary decree
 20 and shall be given treatment similar to that given to all
 21 other filings."

22 SECTION 6. SECTION 85-2-704, MCA, IS AMENDED TO READ:

23 "85-2-704. Termination of negotiations. (1) The
 24 commission or any other---party---to---the---negotiations
 25 negotiating tribe or federal agency may terminate
 negotiations by providing notice to all parties 30 days in

SENATE JUDICIARY COMMITTEE

-9-

EXHIBIT NO.

B

DATE

021385

FILE NO

SBS 28 + 69

SB 28

65

1 advance of the termination date. On the termination date,
 2 the suspension of the application of part 2 provided for in
 3 85-2-217 shall also terminate. The tribe or federal agency
 4 shall file all of its claims for reserved rights within 60
 5 days of the termination of negotiations.

6 (2) (a) However, if a notice of termination is
 7 submitted by either party and the submitting party elects to
 8 retract the notice before the termination date, the notice
 9 of termination must be disregarded and negotiations are not
 10 terminated. The retraction of a notice of termination must
 11 be made by certified mail addressed to:

12 (i) the chairman of the governing body of the affected
 13 tribe;

14 (ii) the officially designated representative of the
 15 affected federal agency; or

16 (iii) the chairman of the reserved water rights compact
 17 commission.

18 (b) The retraction of a notice of termination must be
 19 received before the termination date."

20 THERE IS A NEW MCA SECTION THAT READS:

21 NEW SECTION. Section 7. Status reports to chief water
 22 judge. (1) The Montana reserved water rights compact
 23 commission must submit to the chief water judge, appointed
 24 pursuant to 3-7-221, a report on the status of its
 25 negotiations on July 1, 1985, and every 6 months thereafter.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO.

B

-10-

DATE

021385

SB 28

1 (2) Each report must state which Indian tribes and
2 federal agencies are engaged in negotiations, whether any
3 negotiations with Indian tribes or federal agencies have
4 been terminated, and the progress of negotiations on a
5 tribe-by-tribe and agency-by-agency basis. The report must
6 be made available to the public.

7 NEW SECTION. Section 8. Effective date. This act is
8 effective on-passage-and-approval JULY 1, 1985.

-End-

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. B
DATE 02/3/85
BILL NO. SBs 28+69

REID CHAMBERS' PROPOSED AMENDMENT TO GREY BILL:

Page 6, lines 6 through 8.

Strike: lines 6 through 8 in their entirety

Insert: "(2) The terms of a compact negotiated and ratified under 85-2-702 must be included in the final decree. Provided that the water judge may, after the hearing required to be held by 85-2-233, relieve any person objecting to the compact from all its provisions. A person so relieved shall remain free to litigate all issues in the pending case without, however, receiving any assistance from any person who did not file a timely objection to the compact. Provided, further, that where a person is relieved from the provisions of a compact pursuant to this section, the compact provisions shall nonetheless be considered prima facie valid in all subsequent litigation before the water judge and any person relieved from those provisions shall carry the burden of proof on all contested issues of fact and law."

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. C
DATE 02/13/85
BILL NO. SBS 28 + 69

68

STATE
OF
MONTANA
**ATTORNEY GENERAL
MIKE GREELY**

JUSTICE BUILDING, 215 N. SANDERS, HELENA, MONTANA 59620
TELEPHONE (406) 444-2026

11 February 1985

Greg Petesch
Legislative Council Office
Capitol Building
Helena MT 59620

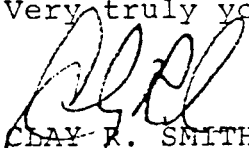
Re: Reid Chambers' proposed amendment to the grey bill
version of Senate Bill No. 28

Dear Greg:

Enclosed please find a redrafted version of Reid Chambers' proposed amendments to section 85-2-234(2) of the grey bill version of Senate Bill 28. As I indicated during our telephone conversation yesterday, I believe the enclosed retains the substance of Mr. Chambers' proposed amendment and otherwise clarifies certain of its syntax.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



CLAY R. SMITH

Assistant Attorney General

Enclosure

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. D

DATE 02/13/85

BILL NO. SBs 28 + 69

(2) The terms of a compact ratified under 85-2-702 shall be included without alteration in the final decree; provided, however, that an objection may be filed under 85-2-233 and the Court may, after hearing, relieve the objector of any provision of the compact so challenged if the objection is established by a preponderance of the evidence; provided, moreover, that a person not filing an objection under 85-2-233 to a ratified compact's provisions shall not be permitted to participate in a hearing on a properly filed objection and shall be bound by the provisions of the ratified compact.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. D

DATE 021385

BILL NO. SBs 28469

Testimony of
CALEB SHIELDS

on behalf of

The Assiniboine & Sioux Tribes
of the Fort Peck Reservation
Regarding

Senate Bill Nos. 28 and 69

My name is Caleb Shields, and I am a member of the Tribal Executive Board of the Assiniboine and Sioux Tribes of the Fort Peck Reservation. I appear here on behalf of the Tribes to support Senate Bill No. 28 and Senate Bill No. 69, as amended. These bills would extend the life of the Reserved Water Rights Compact Commission for two additional years, and would make other desirable changes in state law regarding water adjudications.

First, the Fort Peck Tribes support extending the life of the Commission. The Tribes have been engaged in negotiations with the Reserved Water Rights Compact Commission for over four years. We were deeply concerned in 1983 when we felt that the Commission reneged on its agreement with us to submit a draft compact we had agreed upon to the legislature. Negotiations became inactive for a year and a half after that. The Tribes made it clear that we would not reconsider any of the essential advantages contained in the 1983 agreement. Finally, in November of last year, the Commission returned to the bargaining table. Since then, we have had three productive working sessions and are now even hopeful that a final compact may be agreed upon and

21

submitted to the present legislature. If it is not, we hope that an agreement could be worked out if the life of the Commission is extended for two additional years. We therefore support that extension as contained in amended Senate Bill No. 28.

The marked-up bill also contains other changes which the Fort Peck Tribes support. Section 2 revises existing law concerning the statement of claim to take account of particular aspects of reserved water rights. These changes were proposed by the Fort Peck Tribes to the Compact Commission.

The Tribes also strongly support section 4 of the amended bill, which provides that the terms of any negotiated and ratified compact must be included in the final decree. Present law, Section 85-2-234(2) Montana Code Annotated, is somewhat unclear on this point. While we believe that present law does not permit the State Water Court to modify a ratified compact, we think any ambiguities should be removed from the law.

Once the State ratifies a compact, we believe it binds all water users claiming under State law. However, we understand that some concern has been expressed that this is somehow unfair to a water user who objects in court to a compact. We are agreeable to language which would allow the water judge, after a hearing, to relieve any person objecting to a compact from all its

provisions and leave that person free to litigate all issues in the pending case. However, the law should provide that the State, United States, and the Tribe would litigate against any objecting person. We are submitting language to this effect to the Committee.

The Fort Peck Tribes also strongly support that portion of section 5 of the amended bill which deletes the requirement that the Congress of the United States approve any compact agreed to between the State and an Indian Tribe. The State and a tribe may wish a particular compact to be approved by Congress--for example, a compact where federal appropriations are sought for a water project. But there is no legal reason why the Congress should be required to ratify all water compacts between the State and a tribe. Where that is not necessary, the State and the Tribe, as governmental authorities, should be able to enter into compacts which, if approved by the United States Department of Justice, can be the basis for a final decree in the pending litigation.

I am attaching to my testimony possible language to make sure that the Water Court cannot modify a compact and to allow objectors to opt out of a compact and continue to have their day in court.

This concludes my testimony. I appreciate the opportunity to appear before the Committee and would be pleased to answer any questions you may have. Thank you.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO 1
DATE 02/28/85
BILL NO. SBs 28 + 69

73

85-2-234(2) M.C.A.

The terms of a compact negotiated and ratified under 85-2-702 must be included in the final decree. Provided that the water judge may, after the hearing required to be held by Section 85-2-233, relieve any person objecting to the compact from all its provisions. A person so relieved shall remain free to litigate all issues in the pending case without, however, receiving any assistance from any person who did not file a timely objection to the compact. Provided, further, that where a person is relieved from the provisions of a compact pursuant to this section, the compact provisions shall nonetheless be considered prima facie valid in all subsequent litigation before the water judge and any person relieved from those provisions shall carry the burden of proof on all contested issues of fact and law.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 02/3/85
BILL NO. SBs 28 & 69

NAME :

DATE: 2-13-

ADDRESS :

316 N 26th

Bilings

PHONE :

406-657-6315

REPRESENTING WHOM?

Dept. of Interior

APPEARING ON WHICH PROPOSAL:

SB 28 - 69

DO YOU:

SUPPORT?

AMEND?

OPPOSE?

COMMENTS :

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2

DATE 021385

DATE _____
BILL NO. SBS 28469

75

TESTIMONY OF RICHARD WHITESELL,
AREA DIRECTOR, BILLINGS AREA
BUREAU OF INDIAN AFFAIRS
CONCERNING SENATE BILL 28

Mr. Chairman; Thank you for the opportunity to express the views of the Department of the Interior and to represent Secretary Hodel in these proceedings. The Department of the Interior strongly supports negotiated settlements of Indian and other reserved water rights claims. The advantages of negotiation over litigation are many and obvious. Several Montana Tribes are actively involved in good faith negotiations with the Montana Reserved Water Rights Compact Commission, but with the exception of the Fort Peck negotiations, it will be impossible to conclude compacts by July 1, 1985. On June 4, 1984, Secretary of the Interior Clark wrote to Governor Schwinden emphasizing the desire of the Department to negotiate Federal reserved water rights with the State of Montana. In a November 29, 1984, speech, Department of the Interior Solicitor, Frank Richardson, again stated the Department's policy to negotiate water rights cases rather than litigate.

In his speech, Judge Richardson refers to the long expensive process of litigation that often produces results unfavorable to both sides. A negotiated settlement, on the other hand, is usually beneficial to all concerned parties. Judge Richardson's speech expresses the policy of the Administration and emphasizes our desire to negotiate with the State of Montana. I believe the Solicitor's speech would be useful to the record of these proceedings and I have appended a copy to this testimony with the request that the speech become part of the record.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 02/3/85
BILL NO. SBs 28 + 69

The National Park Service and the Compact Commission are also close to an agreement, but there is no guarantee that a compact can be completed during this session of the legislature. At this time we are reviewing issues regarding water use and management in the Department's program for the Bureau of Land Management and the U.S. Fish and Wildlife Service that may be appropriate for negotiation with the Compact Commission.

We support an extension of the negotiation deadline. We further recommend that the Judiciary Committee consider whether it would be mutually beneficial to the State of Montana and the United States for the legislature to decide not to include an arbitrary deadline for the commencement or completion of compact negotiations. By eliminating such deadlines in the proposed amendment, all parties, including the State, would be assured of the opportunity to begin or continue negotiations at any stage of the adjudication process.

The Department of the Interior is persuaded that Congressional ratification is not required for all elements of a compact. However, approval by some Federal authority will be required. Accordingly, we suggest an expression reflecting this view be incorporated in the amendment.

The Department is also of the view that a compact that is confirmed by the legislature cannot be altered or amended by the courts in the course of the adjudication process. Of course, judicial review of the compact would be available to any party.

Again, we strongly support an extension. Thank you for the opportunity to testify in this important matter.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 021385
BILL NO. SBs 28 + 69

27

A VIEW OF INDIAN WATER LAW

Remarks Prepared for Delivery by
Interior Solicitor Frank K. Richardson

American Indian Lawyer Training Program Conference

Scottsdale, Arizona
November 29, 1984

Good morning. I want to thank Mr. Trudell and the other organizers of the conference for permitting me to address you today. As chief legal officer of the Department of the Interior, I welcome this opportunity to discuss Indian water issues and to listen to the varied view points of the other speakers and participants.

The Department is actively involved in numerous dispute resolutions concerning Indian water rights. The United States holds in trust reserved water rights in more than fifty Indian reservations in seventeen western states. At the present time, the federal government is a party to almost sixty general stream adjudications involving Indian water rights. We are involved either in our capacity as trustee for Indian reserved water rights, or as proprietor of water rights established by the reserved rights doctrine or acquired pursuant to state law for various federal functions such as parks, forests, wildlife refuges, military bases, and land management programs.

In some instances, the federal government has either initiated or been named as a defendant in federal court proceedings. In most of these cases, the federal government has been named as a defendant in state court actions pursuant to the McCarren Amendment. In either forum, I can assure you that we are asserting the Indian water claims as vigorously as possible.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 021385
BILL NO. SBs 28469

In policy and in practice, this Administration takes very seriously its trust responsibilities towards Indians. In the specific area of water rights, as in all Indian affairs, both President Reagan and Secretary Clark are firmly committed to the promotion of Indian tribal economic self-sufficiency, political self-determination with interaction on a government-to-government basis, and careful natural resource development.

At the Department of the Interior, we recognize that, as in so many other contexts, water is fundamental to the tribal achievement of economic independence and self-sufficiency. We have consistently pursued discussions, negotiations, and litigation with a government-to-government framework, believing, as President Reagan has said, that "tribal governments, like state and local governments, are more aware of the needs and desires of their citizens than is the federal government. . . ." Furthermore, we understand that water has a vital role in reservation economic enterprises such as mineral development, farming, and fishing.

As this Administration approaches the beginning of its second term, the Department is evaluating various methods for resolving Indian water disputes. The President's commitment and good faith are resolute. The Winters doctrine of Indian reserved water rights is clear and compelling. However, what has been lacking, until very recently, was a method, a technique for resolving Indian water problems with ultimate solutions which are both practical and equitable. As in so many other aspects of the Department's responsibilities, the increasingly apparent expense, delay, uncertainty, and inadequacy of litigation have frustrated too many Indian water claimants.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 021385
BILL NO. SBS 28469

72

In an article on this subject, Newsweek described such litigation as "courthouse water torture" aptly noting that "most of the water fights wind up in courts, where they linger but seldom die."

A very unfortunate example of this is the litigation involving the Nevada Truckee and Carson River Basins--the Pyramid Lake actions. In 1913, the first law suit was filed involving the Newlands Project, which diverts water from the Truckee River into the Carson River Basin. Litigation concerning water rights in this area has persisted relentlessly. Complaints upon complaints have been filed. Motion after motion has been argued. Interrogatories for discovery have been filed. Generations of lawyers and judges have wrestled with the legal niceties involved. Literally millions of dollars in legal fees have been incurred. The principal contenders for the use of water on the river system are the Pyramid Lake Paiute Tribe of Indians and the Truckee-Carson Irrigation District. In the 71 years since litigation was first initiated in this region, twenty major Pyramid Lake cases have emerged; only ten of which have been finally adjudicated. There has to be a better way.

Indian water rights issues are particularly ill-suited for litigation. Even a final order may not resolve the dispute. All too often, true enjoyment of the rights won in court is deferred until further issues are adjudicated or until water delivery and application systems can be constructed. The only truly effective dispute mechanism is one that is flexible, yields practical solutions, is relatively inexpensive, and is fair.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 021385
BILL NO. SBs 28 & 69

The concept of negotiated settlements is certainly not new to the legal system, but it is new to Indian water rights. In his Senate confirmation hearings, Secretary Clark expressed his hope that the Department of the Interior could utilize this process. When I first came to Washington to assume responsibility as Solicitor, Secretary Clark personally urged me to explore the many possibilities available in settling Indian water rights through negotiations. I am firmly convinced of the wisdom of this approach in large part because of more than 42 years of exposure to the litigation and adjudication of cases in a courtroom.

Litigation should be the absolute last resort in Indian water right disputes, not only because of long delay, heavy expense, and substantial uncertainty, but also because of the "wooden" nature of the process. The precise issues are framed by the litigants. The specific parties are fixed by the litigants. The method of presenting evidence is fixed by long-established evidentiary rules which do not necessarily lend themselves to the ascertainment of either the truth or the controlling issues of policy or fairness.

On the other hand, a negotiated settlement is normally beneficial to all the parties concerned. Participants in negotiated settlements can take into consideration the wide range of affected interests and can accommodate them fairly. They can and should consider among other factors:

-- the unique characteristics of each reservation,

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 021385
BILL NO. SBs 28+69

81

- the differences in the nature and extent of the water supply available to the parties,
- the climate,
- the terrain,
- the access to markets,
- the scarcity and abundance of reservation natural resources requiring water for development,
- the variety of Indian claims,
- the variety of non-Indian claims, and
- the interests of federal, state, and local governments.

Through the process of negotiated settlements, claimants can acknowledge the scarcity of water and pursue creative and innovative schemes aimed at maximizing benefits from our water sources. Agreements may be made for improving water delivery and management systems. Programs such as these cannot be conveniently or legally required in the context of an adjudication.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 021385
BILL NO. SBs 28 & 69

Negotiated settlements avoid the uncertainty and loss of control often associated with litigation. Parties to a negotiation determine the course and outcome of their negotiations.

Finally, parties often find that significant, intangible benefits accrue through this process. Negotiations afford an opportunity for the parties to develop mutual respect for one another from a clearer understanding of each other's interests, goals, and fears. Moreover, settlement agreements which require congressional approval encourage a partnership rather than an adversarial approach, as together the parties work towards a common goal.

Secretary Clark and the Solicitor's Office have received a very favorable response to this problem-solving approach. For example, in a meeting with the Ad Hoc Working Group on Indian Reserved Water Rights representing the Western Governor's Association, Western Regional Council, National Congress of American Indians, Council on Energy Resource Tribes and Native American Rights Fund, the members of the working Group pledged their cooperation and assistance in our joint efforts to pursue negotiated water settlements.

At the present, the Department is actively engaged in negotiations with several Indian and non-Indian water claimants. I earnestly believe that we can arrive at solutions which satisfactorily benefit each of these parties.

An example of the Reagan Administration's commitment in this area is the Legislation Concerning the Ak-Chin Community Water Settlement signed into law by

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 02/3/85
BILL NO. SBs 28 + 69

43

the President on October 19, 1984. This bill is the consummate work product of a negotiated water settlement. It "reconfirms," as the President said in his signing remarks, "our commitment to the policy of Indian tribal self-determination and does so in a fiscally responsible manner."

In 1978, Congress enacted legislation providing for the settlement of the Ak-Chin Indian Community's claims to water for its reservation in central Arizona. Leaders of the Ak-Chin Indian Community, Arizona officials, non-Indian water users in central Arizona, the committees in the Congress, and representatives of this Department worked to enact the Ak-Chin settlement.

As we proceeded to implement the settlement, it became apparent that many of the assumptions that Congress made in enacting the settlement had not been borne out by later events. The cost of providing an interim supply of water in 1984-2002 period was more than twice the amount which Congress had authorized. Yet, even this increased expenditure would not secure the permanent water supply agreed to be provided as soon as possible, but no later than 2003.

These conclusions led us to begin discussions with Ak-Chin regarding ways to amend the 1978 Act and economically to satisfy their congressionally granted water entitlement.

The Ak-Chin bill ratifies a series of agreements negotiated by officials of the Department of the Interior, with the affected parties, over the past two years. It succeeds in fulfilling the intent of the earlier Act by providing a

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 021385
BILL NO. SBS 28 + 69

usable, permanent water supply beginning in 1988 at less than half the cost of the previous, temporary plan.

The ratified agreement settles the outstanding water claims of the Ak-Chin Indian community, provides a permanent water supply to be delivered through the Central Arizona Project facilities, provides funds for water conservation, and ensures that water not needed to satisfy the Ak-Chin entitlement will be available for allocation to other water users in central Arizona. Finally, the agreement provides an enforcement remedy of penalties should the Secretary be unable to deliver the water amounts allocated to the Ak-Chin community. Ak-Chin is a living testament to the benefits which will flow from careful planning, patience, hard work, innovation, and above all, a spirit and willingness to compromise--to give and take.

As we look to the future in our negotiation efforts, we will be guided by three principles which seem to me essential in fulfilling our commitments and fiduciary duties in a fiscally responsible manner:

1. The negotiations should be initiated by representatives of Indian tribal governments and by the local water users. Parties must approach negotiations in a spirit of cooperation and with an eye towards creating an integrative rather than zero-sum solution.
2. The federal government must be a party to the negotiations.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 021385
BILL NO. SBs 28 + 69
45

3. The federal government cannot provide unlimited funding in water rights settlements. Uncle Sam does not have a deep pocket. The federal, state, and local governments, as well as Indian and non-Indian water users, must explore and implement various schemes for cost-sharing and in-kind exchanges.

The favorable experience of Ak-Chin strengthens our resolve to pursue non-litigious methods of settling Indian water claims. In the case of Ak-Chin, negotiations were initiated before the courtroom battle began. Perceiving that an impending adjudication could result in serious disruption in existing patterns of water use, the parties resorted to more effective, direct negotiations.

However, the negotiated settlements of Indian water claims can be initiated at any stage of the adjudication process. As with other types of interests, Indian water claims can be successfully negotiated while adjudication is pending. For example, the Papago settlement, again in Arizona, was not enacted until seven years after litigation commenced.

Even when an adjudication has been completed, the parties may find negotiation to be beneficial. For, in many instances, the near certainty of appeal and the reluctance of courts to dispose of all the water issues increases the attractiveness of negotiating.

In many instances, efforts to achieve a negotiated settlement which are unsuccessful at one stage of the adjudication process may prove highly effective

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 021385
12-28-19

at a later date. The advantages of settlements change from time to time and reflect modifications in conditions such as new judicial orders, impending legislation, annual rainfall, financial pressures, changes in key personalities, and technical developments in the water industry.

The complexity of the Indian water rights issues cannot be underestimated. Finding fair and practical solutions to the problems requires considerable expertise, creativity, and good faith. This Administration accepts the challenge. We will meet it with careful consideration of our trust responsibilities and with due regard for the country's national fiscal concerns.

Having participated in well over 100 civil jury trials in my 30 years as a lawyer, and having reviewed the records in many others in my 12 years as a judge, I say with all of the force at my command that the courtroom is not the first place to go for equitable and practical solutions to Indian water rights problems. It is the last place to go. The so-called "courthouse water torture" leaves few unscathed.

Nonetheless, I can assure you in all earnestness, that, when negotiations prove unfruitful and when the federal government is joined as a party in Indian water rights lawsuits, we will engage in vigorous representation as trustee on behalf of Indian tribes wherever and whenever those claims arise.

As Solicitor of the Department of the Interior, I want to emphasize my open-door policy. I am always happy to converse directly or by telephone with

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 021385
BILL NO. SBs 28 + 69

Indian tribal leaders. I have come across the continent to tell you this face to face. It seems to me that this access enables us all to become better informed of the varied interests, issues, and problems. So much depends upon the climate and the atmosphere of our discussions and negotiations. There has to be willingness to listen, to consider, to be willing to give and take, to compromise where the end result is fair and just, to accommodate, to share, and to cooperate.

It is with an attitude of openness and optimism that Tim Vollmann, Associate Solicitor for Indian Affairs, and I have joined you at this conference. I have enjoyed the opportunity to meet with many of you and to visit with you today. Unfortunately, I am unable to remain until the final conclusion of the conference. Tim Vollmann will remain, however, and will continue to meet and exchange ideas with many of you. I hope to have full reports of your deliberations and conclusions.

The challenges facing each of us involved in Indian water rights are complex and sometimes quite difficult. Wherever possible, let us diligently pursue the broad avenues of negotiated settlements seeking solutions as partners in a cooperative manner, where possible, and so that our common, vital, national treasure--water--can be put to its fullest possible use.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 02/3/85
BILL NO. SBs 28 + 69

R E S O L U T I O N

NO: 120-84

TO SUPPORT A TWO YEAR EXTENSION FOR THE MONTANA STATE COMPACT COMMISSION
ON RESERVED WATER RIGHTS

WHEREAS, the Chippewa-Cree Tribal Business Committee is the governing body of the Chippewa-Cree Tribe of the Rocky Boy's Indian Reservation, Montana, by the authority of the Constitution and By-Laws of the Chippewa-Cree Tribe, approved on the 23rd. day of November, 1935, and,

WHEREAS, pursuant to the Constitution and By-Laws of the Chippewa-Cree Tribe, the Chippewa-Cree Tribal Business Committee is charged with the duty of protecting the health, security and general welfare of the Chippewa-Cree Tribe, and,

WHEREAS, the Business Committee hereby supports development of the political economic, and social well-being of the Tribe, and,

WHEREAS, the Chippewa-Cree Tribe is presently negotiating Water Rights with the State Compact Commission on Reserved Water Rights, and,

WHEREAS, the Chippewa-Cree Tribe has entered negotiations in good faith, and,

WHEREAS, the Chippewa-Cree Tribe has not concluded a negotiated compact with the State of Montana within the time frame identified in SB 76.

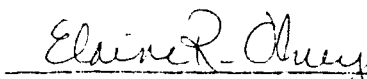
THEREFORE BE IT RESOLVED, that the Chippewa-Cree Tribe hereby requests that the Montana State Legislature grant a two (2) year extension to the Montana State Compact Commission on Reserved Water Rights.

C E R T I F I C A T I O N

I, THE UNDERSIGNED, AS SECRETARY/TREASURER OF THE CHIPPEWA CREE TRIBE HEREBY CERTIFY THAT THE BUSINESS COMMITTEE IS COMPOSED OF NINE MEMBERS OF WHOM eight (2) MEMBERS CONSTITUTING A QUORUM WERE PRESENT AT A MEETING DULY AND REGULARLY CALLED, NOTICED, CONVENED, AND HELD THIS 20th DAY OF December, 19 84, AND THAT FOREGOING RESOLUTION WAS DULY ADOPTED, AT SUCH MEETING, BY THE AFFIRMATIVE VOTE OF seven (7) MEMBERS FOR AND zero (0) MEMBERS AGAINST AND THAT THIS RESOLUTION HAS NOT BEEN RESCINDED OR AMENDED IN ANY WAY.



CHAIRMAN, BUSINESS COMMITTEE



SECRETARY/TREASURER

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 3

DATE 02/385

BILL NO. SB5 28 + 69

NAME: Daniel Decker DATE: Feb. 13, 1985

ADDRESS: Confederated Salish and Kootenai Tribes
Tribal Complex
Box 275
Pablo, Mont. 59821

PHONE: (406) 675-4600 ext. 534

REPRESENTING WHOM? Confederated Salish and Kootenai Tribes

APPEARING ON WHICH PROPOSAL: SB 28

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: _____

See submitted comment.

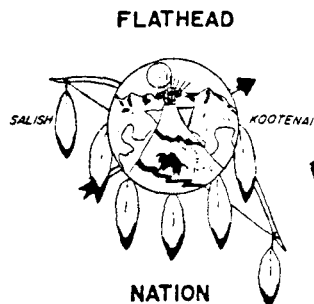
PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 021385
BILL NO. SB 28



THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION

Box 278
Pablo, Montana 59855
(406)675-4600



Fred Houle, Jr. - Executive Secretary
Vern L. Clairmont - Executive Treasurer
George Hewankorn - Sergeant-at-Arms

TRIBAL COUNCIL MEMBERS:
Joseph "Joe Dog" Felsman - Chairman
James H. Steele - Vice-Chairman
Al Hewankorn
Kevin S. Howlett
Robert L. McCrea
Sonny Morigeau
Michael Pablo
Victor L. Stinger
Ron Theriault
Teresa M. Wall

SENATE JUDICIARY COMMITTEE

The Confederated Salish and Kootenai Tribes would like to present this statement to the Senate Judiciary Committee on the "grey" copy of Senate Bill No. 28.

The Confederated Salish and Kootenai Tribes support the extension of the negotiating deadline date for the Reserved Water Rights Compact Commission. The two year extension is needed so that negotiations between the State and Indian Tribes will be a viable alternative to litigation. One needs only to look to our neighbor, Wyoming, to see the expense to tribes and the states if litigation is the route chosen to determine our water rights. The amendment proposed in Section 1 of the bill extending the negotiation deadline date to July 1, 1987 is supported by the Tribes.

The amendments proposed in Section 2 of the bill seem to be an effort to prioritize types of use of reserved water rights held by Tribes. The changes are confusing when applied to the existing federal law governing Indian reserved water rights. It is established federal law that reserved waters are not lost through

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 4

DATE 021385

BILL NO. SB 28

non-use, therefore, actual use of the water is not necessary in order for tribes to possess a reserved water right. Applying diversion standards to reserved water rights is inappropriate and inconsistent with well established federal law. Further putting an obligation upon Indian tribes to find supportive federal case law on which to support their claim is a burden not placed upon any other water user in the Montana Water Use Act. To do so would create a legal briefing for Indian Tribes prior to any administrative action or hearing process.

The amendment in Section 3 of the bill is acceptable to the Tribes.

The amendment proposed in subsection (2) of Section 4 of the bill, on page 6, is supported by the Confederated Tribes. It is the Tribes position that a compact negotiated with Montana should be binding upon the parties and entered unchanged into the final decree.

The remainder of the amendments in Section 4 of the bill are seen as unnecessary, since, the terms of a negotiated compact would likely include all of this information.

The proposed language on line 22 of page 8, suggesting that no negotiations may be commenced after July 1, 1985, is viewed as contradictory to policy of negotiation. The original provisions of the Water Use Act contained no such provision and six of seven Indian reservations in Montana are now negotiating with Montana. This language seemingly serves no purpose other than to threaten one Tribe in Montana and therefore is contradictory to the stated policy preference for negotiations.

Lines 11 and 12 on page 9 contain the phrase "and unless renegotiated" seems to add extra verbage that unnecessarily creates ambiguity and vagueness that is not needed; it is recommended that the phrase "and unless renegotiated" be eliminated. Again, the Tribes are supportive of language requiring that concluded compacts be entered unchanged into final water decrees.

If the deadline for beginning negotiations is eliminated than the changes for terminating negotiations on pages 9 and 10 are unneeded.

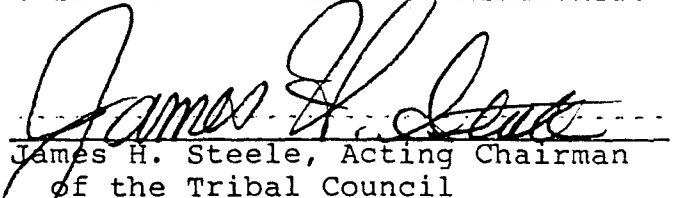
Finally, The Confederated Tribes have no objections to reports being made to the Montana Water Court.

The Tribes were most supportive of the Legislative Council bill sponsored by Senator Eck, S.B. 28, over S.B. 69. The Tribes for obvious policy considerations favor an extension of the negotiation deadline and see that is the most important consideration to be given the proposed legislation.

The Confederated Salish and Kootenai Tribes thank you for any consideration given these comments, and recommend passage of an extension for negotiations with a provision that concluded compacts be entered into final decrees affecting tribal lands.

Sincerely,

CONFEDERATED SALISH AND KOOTENAI
TRIBES OF THE FLATHEAD RESERVATION


James H. Steele, Acting Chairman
of the Tribal Council

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 4

DATE 02/3/85

FILE NO. SB 28

FEB 08

STATE
OF
MONTANA

ATTORNEY GENERAL
MIKE GREELY

JUSTICE BUILDING, 215 N. SANDERS, HELENA, MONTANA 59620
TELEPHONE (406) 444-2026

7 February 1985

Senator Joseph P. Mazurek
Chairman, Senate Judiciary Committee
Box 84, Capitol Station
Helena MT 59620

Re: Attorney General's Suggested Revisions to Grey Bill
Version of Senate Bill No. 28

Dear Chairman Mazurek:

Enclosed please find 10 copies of the Attorney General's suggested revisions to the grey bill version of Senate Bill No. 28. We ask that the enclosed be distributed to the members of the Senate Judiciary Committee prior to the hearing scheduled for February 13, 1985. We have forwarded a copy of the enclosed to Senator Eck and to Greg Petesch. The suggested revisions are identical to those previously submitted to you except for the addition of the words "possessing water" to line 16 of section 85-2-234(3), MCA; those words were inadvertently deleted in our suggested revisions and appear in the grey bill as presently constituted.

Thank you for your courtesy and cooperation in this matter. Should you have any questions, please contact me.

Very truly yours,



CLAY R. SMITH
Assistant Attorney General

Enclosures

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 021385
BILL NO. SB 28

94

PROPOSED ATTORNEY GENERAL'S REVISIONS
TO GREY BILL VERSION OF SENATE BILL NO. 28
AND EXPLANATION

Attached are the Attorney General's proposed revisions to the grey bill version of Senate Bill No. 28. There are eight proposed revisions whose locations are noted by corresponding numerical entries in the right margin.

1. Revision No. 1. Revision No. 1 deletes the words "for informational purposes" from the proposed amendment to section 85-2-231(3), MCA. The effect of the Senate Bill No. 28 amendment, if adopted without this office's suggested revision, is to deny affected non-reserved water right users any opportunity to challenge the quantification, use or priority date provisions of a ratified compact which they believe adversely affect them. We have concluded due process requires that such persons be given an opportunity to be heard in connection with any such objection, and the present challenge provisions in section 85-2-233, MCA, afford such opportunity. A failure to allow any opportunity for challenge, moreover, may well undercut the binding nature of the associated final decrees and

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

DATE 021385

BILL NO. SB 28

thereby prejudice the entire general adjudicatory process.

2. Revision No. 2. Our second suggested revision involves deletion of the entirety of Senate Bill No. 28's proposed amendment to section 85-2-234(2), MCA. Senate Bill No. 28's proposed amendment to that subsection presently reads: "The terms of the compact negotiated and ratified under 85-2-702 must be included in the final decree." This proposed amendment by Senate Bill No. 28 must be read in connection with the proposed amendment to section 85-2-231(3), MCA, discussed above and makes clear that the Water Court has no authority to modify the terms of a ratified compact.

The purpose of Senate Bill No. 28's proposed amendment to section 85-2-234(2), MCA, is to make binding on the Water Court and all affected non-reserved water right users the terms of a ratified compact. This office agrees that the Water Court's authority to modify ratified compacts should be strictly restricted so as to make the negotiation process itself meaningful. Nonetheless, for those reasons discussed above, we believe due process required notice to affected non-reserved water right users and an opportunity to object. Our suggested revision is intended to address both the concern that ratified compacts be accorded great weight in the final decree process and the need to allow water users the opportunity to raise challenges.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

DATE 02/3/85

BILL NO. SB 28 96

3. Revisions Nos. 3, 4, and 5. These suggested revisions are technical and involve only the deletion of the words "federal agency or tribe" from the grey bill's proposed section 85-2-234(3) and (4), MCA, and the words "tribe or federal agency" from section 85-2-234(6), MCA. We suggest these changes because the term "person" as presently defined in section 85-2-102(10), MCA, includes tribes and agencies of the United States, and there is consequently no need to mention those entities separately.

4. Revisions Nos. 6 and 7. Our suggested revisions add the words "the secretary of the interior or his authorized representative and, if required by the terms of the compact" to section 85-2-702(2), MCA, of the grey bill and are technical in nature. Because Senate Bill No. 28 proposes to remove congressional approval as a condition to a binding compact, we believe approval by the secretary of the interior is necessary since the United States, as a legal matter, holds the involved water rights in trust for the tribes. We further believe that, under some circumstances, the parties to a compact may want one or more of its provisions to be ratified by congress and have thus added a provision in contemplation of such possibility.

5. Revision No. 8. Our suggested revision deletes the words "for informational purposes" from lines 10 and 11 and the words "and unless renegotiated,

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

DATE 021385

SR 28

the terms of the compact must be included in the final decree without alteration" from lines 11 through 13 of the grey bill. The suggested revision also adds the words "and approval by the secretary of the interior or his authorized representative." The reason for the deletion is the due process concern discussed in connection with our suggested revisions to sections 85-2-231(3) and 85-2-234(2), MCA, of Senate Bill No. 28. We propose the additional wording for the same reasons discussed in connection with our suggested revision to section 85-2-702(2), MCA.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

DATE 02/3/85

BILL NO. SB 28

ATTORNEY GENERAL'S
PROPOSED REVISIONS

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5DATE 02/3/85BILL NO. SB 28

SENATE BILL NO. 28

INTRODUCED BY

BY REQUEST OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A 2-YEAR
EXTENSION OF THE EXISTENCE OF THE RESERVED WATER RIGHTS
COMPACT COMMISSION; PROVIDING FOR FEDERAL APPROVAL OF A
COMPACT ONLY IF LEGALLY NECESSARY; REQUIRING THAT THE TERMS
OF A COMPACT SET FORTH IN A PRELIMINARY DECREE BE REPRODUCED
UNCHANGED IN THE FINAL DECREE; EXTENDING FROM 60 DAYS TO 6
MONTHS THE TIME PERIOD FOR FILING IN THE WATER COURT CLAIMS
UNRESOLVED BY THE COMPACT COMMISSION; AMENDING SECTIONS
85-2-217, 85-2-224, 85-2-231, 85-2-234, AND 85-2-702, AND
85-2-704, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-217, MCA, is amended to read:

"85-2-217. Suspension of adjudication. While
negotiations for the conclusion of a compact under part 7
are being pursued, all proceedings to generally adjudicate
reserved Indian water rights and federal reserved water
rights of those tribes and federal agencies which are
negotiating are suspended. The obligation to file water
rights claims for those reserved rights is also suspended.
This suspension shall be effective until July 1, 1985 1987,

as long as negotiations are continuing or ratification of a completed compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, ~~1985~~ 1987, the suspension shall terminate on that date. Upon termination of the suspension of this part, the tribes and the federal agencies shall be subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not to negotiate their reserved water rights shall be subject to the full operation of the state adjudication system and may not benefit from the suspension provisions of this section."

SECTION 2. SECTION 85-2-224, MCA, IS AMENDED TO READ:

"85-2-224. Statement of claim. (1) The statement of claim for each right arising under the laws of the state and for each right reserved under the laws of the United States which has been actually put to use shall include substantially the following:

(a) the name and mailing address of the claimant;

(b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;

(c) the quantities of water and times of use claimed;

(d) the legal description, with reasonable certainty,

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

DATE 02/3/85

BILL NO. SB 28

100

1 of the point or points of diversion and places of use of
2 waters;

3 (e) the purpose of use, including, if for irrigation,
4 the number of acres irrigated;

5 (f) the approximate dates of first putting water to
6 beneficial use for the various amounts and times claimed in
7 subsection (c); and

8 (g) the sworn statement that the claim set forth is
9 true and correct to the best of claimant's knowledge and
10 belief.

11 (2) The Any claimant filing a statement of claim under
12 subsection (1) shall submit maps, plats, aerial photographs,
13 decrees, or pertinent portions thereof, or other evidence in
14 support of his claim. All maps, plats, or aerial
15 photographs should show as nearly as possible to scale the
16 point of diversion, place of use, place of storage, and
17 other pertinent conveyance facilities.

18 (3) Any statement of claim for rights reserved under
19 the laws of the United States which have not yet been put to
20 use shall include substantially the following:

21 (a) the name and mailing address of the claimant;

22 (b) the name of the watercourse or water source from
23 which the right to divert or make use of water is claimed,
24 if available;

25 (c) the quantities of water claimed;

1 (d) the priority date claimed;

2 (e) the laws of the United States on which the claim
3 is based; and

4 (f) the sworn statement that the claim set forth is
5 true and correct to the best of claimant's knowledge and
6 belief."

7 Section 3. Section 85-2-231, MCA, is amended to read:

8 "85-2-231. Preliminary decree. (1) The water judge
9 shall issue a preliminary decree. The preliminary decree
10 shall be based on:

11 (a) the statements of claim before the water judge;

12 (b) the data submitted by the department;

13 (c) the contents of compacts approved by the Montana
14 legislature and the tribe or federal agency or, lacking an
15 approved compact, the filings for federal and Indian
16 reserved rights; and

17 (d) any additional data obtained by the water judge.
18 The preliminary decree shall be issued within 90 days after
19 the close of the special filing period set out in
20 85-2-702(3) or as soon thereafter as is reasonably feasible.
21 This section does not prevent the water judge from issuing
22 an interlocutory decree or other temporary decree if such a
23 decree is necessary for the orderly administration of water
24 rights prior to the issuance of a preliminary decree.

25 (2) A preliminary decree may be issued for any

SENATE JUDICIARY COMMITTEE

-4-

EXHIBIT NO.

5

DATE

021385

BILL NO.

SB 28

SB 28

108

1 hydrologically interrelated portion of a water division,
2 including but not limited to a basin, subbasin, drainage,
3 subdrainage, stream, or single source of supply of water, at
4 a time different from the issuance of other preliminary
5 decrees or portions of the same decree.

6 (3) The preliminary decree shall contain the
7 information and make the determinations, findings, and
8 conclusions required for the final decree under 85-2-234.
9 The water judge shall include in the preliminary decree

10 the contents of a compact negotiated
11 under the provisions of part 7 that has been approved by the
12 legislature and the tribe or federal agency whether--or--not
13 it-has-been-ratified-by-congress.

14 (4) If the water judge is satisfied that the report of
15 the water master meets the requirements for the preliminary
16 decree set forth in subsections (1) and (3), and is
17 satisfied with the conclusions contained in the report, the
18 water judge shall adopt the report as the preliminary
19 decree. If the water judge is not so satisfied, he may, at
20 his option, recommit the report to the master with
21 instructions, or modify the report and issue the preliminary
22 decree."

23 Section 4. Section 85-2-234, MCA, is amended to read:

24 "85-2-234. Final decree. (1) The water judge shall, on
25 the basis of the preliminary decree and on the basis of any

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

1 hearing that may have been held, enter a final decree
 2 affirming or modifying the preliminary decree. If no
 3 request for a hearing is filed within the time allowed, the
 4 preliminary decree automatically becomes final, and the
 5 water judge shall enter it as the final decree.

6 (2) The final decree shall set forth the terms of any
 7 compact included in the preliminary decree without change
 8 unless, as to any matter referred to in paragraph (6) below,
 9 the water judge (1) finds that a proper challenge to such
 10 matter was made under 85-2-233 and (2) determines beyond a
 11 reasonable doubt that no substantial factual or legal basis
 12 exists for the term of the compact to which the challenge is
 13 made.

14 (3) The final decree shall establish the existing
 15 rights and priorities within the water judge's jurisdiction
 16 of persons required by 85-2-221 to file a claim for an
 17 existing right, and of persons required to file a
 18 declaration of existing rights in the Powder River Basin
 19 pursuant to an order of the department or a district court
 20 issued under sections 8 and 9 of Chapter 452, Laws of 1973,
 21 AND OF ANY PERSON POSSESSING WATER
 22 RIGHTS ARISING UNDER FEDERAL LAW, REQUIRED BY 85-2-702 TO
 23 FILE CLAIMS.

24 (4) The final decree shall state the findings of
 25 fact, along with any conclusions of law, upon which the
 existing rights and priorities of each person

named in the decree are based.

26 (5) For each person who is found to have an
 27 existing right ARISING UNDER THE LAWS OF THE STATE OF
 28 MONTANA, the final decree shall state:

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

DATE 02/3/85

BILL NO. SB 28 SB 28

1 (a) the name and post-office address of the owner of
2 the right;

3 (b) the amount of water, rate, and volume, included in
4 the right;

5 (c) the date of priority of the right;

6 (d) the purpose for which the water included in the
7 right is used;

8 (e) the place of use and a description of the land, if
9 any, to which the right is appurtenant;

10 (f) the source of the water included in the right;

11 (g) the place and means of diversion;

12 (h) the inclusive dates during which the water is used
13 each year;

14 (i) any other information necessary to fully define
15 the nature and extent of the right.

16 (6) FOR EACH PERSON

17 POSSESSING WATER RIGHTS ARISING UNDER THE LAWS OF THE UNITED
18 STATES, THE FINAL DECREE SHALL STATE:

19 (A) THE NAME AND MAILING ADDRESS OF THE HOLDER OF THE
20 RIGHT;

21 (B) THE SOURCE OR SOURCES OF WATER INCLUDED IN THE
22 RIGHT;

23 (C) THE QUANTITY OF WATER INCLUDED IN THE RIGHT;

24 (D) THE DATE OF PRIORITY OF THE RIGHT;

25 (E) THE PURPOSE FOR WHICH THE WATER INCLUDED IN THE

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

1 RIGHT IS CURRENTLY USED, IF AT ALL;

2 (F) THE PLACE OF USE AND A DESCRIPTION OF THE LAND, IF
3 ANY, TO WHICH THE RIGHT IS APPURTENANT;

4 (G) THE PLACE AND MEANS OF DIVERSION, IF ANY;

5 (H) ANY OTHER INFORMATION NECESSARY TO FULLY DEFINE
6 THE NATURE AND EXTENT OF THE RIGHT, INCLUDING THE TERMS OF
7 ANY COMPACTS NEGOTIATED AND RATIFIED UNDER 85-2-702."

8 Section 5. Section 85-2-702, MCA, is amended to read:

9 "85-2-702. Negotiation with Indian tribes. (1) The
10 reserved water rights compact commission, created by
11 2-15-212, may negotiate with the Indian tribes or their
12 authorized representatives jointly or severally to conclude
13 compacts authorized under 85-2-701. Compact proceedings
14 shall be commenced by the commission. The commission shall
15 serve by certified mail directed to the governing body of
16 each tribe a written request for the initiation of
17 negotiations under this part and a request for the
18 designation of an authorized representative of the tribe to
19 conduct compact negotiations. Upon receipt of such written
20 designation from the governing body of a tribe, compact
21 negotiations shall be considered to have commenced, EXCEPT
22 THAT NO COMPACT PROCEEDINGS MAY COMMENCE AFTER JULY 1, 1985.

23 (2) When the compact commission and the Indian tribes
24 or their authorized representatives have agreed to a
25 compact, they shall sign a copy and file an original copy

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

DATE

021385

SB 28

FILE NO.

SB 28

1 with the department of state of the United States of America
 2 and copies with the secretary of state of Montana and with
 3 the governing body for the tribe involved. The compact is
 4 effective and binding upon all parties upon ratification by
 5 the legislature of Montana, any affected tribal
 6 governing body, ~~and~~, the Secretary of the Interior or his
 7 authorized representative and, if required by the terms of
the compact, the congress of the United States.

8 (3) Upon its ~~approval~~ RATIFICATION by the Montana
 9 legislature and the tribe ~~or federal agency~~, and approval by
 10 the Secretary of the Interior or his authorized
 11 representative, the terms of a compact must be included in
 12 the preliminary decree as provided by 85-2-231. However, if
 13 approval of the state legislature, ~~and the tribe or federal~~
 14 ~~agency~~ and the Secretary of the Interior or his authorized
 15 representative has not been accomplished by July 1, ~~1985~~
 16 1987, all ~~federal and~~ Indian claims for reserved water rights
 17 that have not been resolved by a compact must be filed with
 18 the department within 60-days 6 months. These new filings
 19 shall be used in the formulation of the preliminary decree
 20 and shall be given treatment similar to that given to all
 21 other filings."

21 SECTION 6. SECTION 85-2-704, MCA, IS AMENDED TO READ:

22 "85-2-704. Termination of negotiations. (1) The
 23 commission or any other---party---to---the---negotiations
 24 negotiating tribe or federal agency may terminate
 25 negotiations by providing notice to all parties 30 days in

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

-9-

DATE 02/3/85

SB 28

1 advance of the termination date. On the termination date,
 2 the suspension of the application of part 2 provided for in
 3 85-2-217 shall also terminate. The tribe or federal agency
 4 shall file all of its claims for reserved rights within 60
 5 days of the termination of negotiations.

6 (2) (a) However, if a notice of termination is
 7 submitted by either party and the submitting party elects to
 8 retract the notice before the termination date, the notice
 9 of termination must be disregarded and negotiations are not
 10 terminated. The retraction of a notice of termination must
 11 be made by certified mail addressed to:

12 (i) the chairman of the governing body of the affected
 13 tribe;

14 (ii) the officially designated representative of the
 15 affected federal agency; or

16 (iii) the chairman of the reserved water rights compact
 17 commission.

18 (b) The retraction of a notice of termination must be
 19 received before the termination date."

20 THERE IS A NEW MCA SECTION THAT READS:

21 NEW SECTION. Section 7. Status reports to chief water
 22 judge. (1) The Montana reserved water rights compact
 23 commission must submit to the chief water judge, appointed
 24 pursuant to 3-7-221, a report on the status of its
 25 negotiations on July 1, 1985, and every 6 months thereafter.

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

DATE 021385

RII NO. SB 28

1 (2) Each report must state which Indian tribes and
2 federal agencies are engaged in negotiations, whether any
3 negotiations with Indian tribes or federal agencies have
4 been terminated, and the progress of negotiations on a
5 tribe-by-tribe and agency-by-agency basis. The report must
6 be made available to the public.

7 NEW SECTION. Section 8. Effective date. This act is
8 effective ~~on-passage-and-approval~~ JULY 1, 1985.

-End-

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 5

-11- DATE 021385

SB 28

STATE COORDINATOR OF INDIAN AFFAIRS



TED SCHWINDEN, GOVERNOR

1218 EAST SIXTH AVENUE

STATE OF MONTANA

(406) 444-3702
DONALD L. CLAYBORN, COORDINATOR

HELENA, MONTANA 59620

FEBRUARY 13, 1985

TESTIMONY

SENATE BILL NO. 28

THE COORDINATOR OF INDIAN AFFAIRS OFFICE SUPPORTS THE ORIGINAL LEGISLATION WITHOUT THE ADDITIONS WHICH HAVE CAUSED SO MANY QUESTIONS CONCERNING THEIR AFFECT ON CURRENT WATER ADMINISTRATION LITIGATION AND THE PROCESS OF INTEGRATION OF COMPACTS IN THE WATER JUDGES DECREE.

I HAVE REVIEWED REED CHAMBERS AMENDMENT AND FIND THAT IT WAS CLARIFYING SOME OF OUR PROBLEMS OF INCLUSION OF AN AGREEMENT IN THE FINAL DECREE.

THE FINAL PROBLEM AS THE BILL NOW STANDS CONCERNS THAT PROBLEM OF INCLUSION OF INDIAN WATER RIGHTS UNDER STATE ADMINISTRATION. THE NEW LANGUAGE ON PAGE 2, LINE 14 THROUGH 18, HAS A LANGUAGE CHANGE BUT IT APPEARS THAT AFFECT IS STILL THE SAME: UNDER THE DEFINITION SECTION THAT THIS SECTION IS, THE NEW LANGUAGE STILL PLACES INDIAN WATER RIGHTS UNDER STATE ADMINISTRATION.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 02/385
BILL NO. SB 28

110



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

BILLINGS AREA OFFICE

316 NORTH 26TH ST.

BILLINGS, MONTANA 59101

IN REPLY REFER TO:

FEB 15 1985

Senator Joseph P. Mazurek
Senate Judiciary Committee
Capitol Station
Box 84
Helena, Montana 59620

Dear Senator Mazurek:

Once again, I wish to express my appreciation for being allowed to testify on February 13, 1985, regarding Senate Bill 28-69.

In response to Senator Towe's question, we have reviewed the two proposed amendments and have the following comments:

Regarding the Attorney General and Reid Chambers' drafts of subsection (2) of Section 3 of Senate Bill No. 28, the Department of the Interior does not require any specific language of either draft, except that it desires the inclusion of a compact in a final decree. Although it may be implied, please consider allowing parties (including the State, Tribe, United States, or other adversely effected interests) to "participate" in an objectors hearing in order to rebut the objectors assertions in defense of such parties rights. Such parties' rights need not be increased thereby.

Sincerely,

Acting Area Director

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 8

DATE 021385

BILL NO. SBs 28 + 69

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Dr. Brunner	W. I. F. E.	SB 69	X	
Dr. Clayborn	Indian Affairs	HB 13		
Wm. J. Necker	Confederated Salish & Kootenai Tribes	HB 12	X	
Joe Rosette	Chippewas Cree Tribe	HB 28	X	
Richard Seng	Cornwall Member	HB 28	X	
James Mungro	Ojibwa - Lac Seul	SB 69	X	
Dr. F. Snell	Fort Belknap Indian Community	SB 28		
John Shontz	Ft. Belknap, CC	SB 69		
Richard Whitson	Water Marketing Comm.	SB 69	X	
DALE SHIELDS	Dept Interior	SB 28	X	
Joe McKay	Ft. Peck Tribes	SB 69	X	
Philip E. Roy	Blackfeet Tribes	SB 28	X	
Ken Beartusk	Blackfeet Tribe	SB 69	X	
Hermie Parker	Northern Cheyenne	SB 28	X	
Bill Asher	Northern Cheyenne	SB 69	X	
Calvin L. Wilson	APA	SB 69	X	
Marcia Fundle	N. Cheyenne Tribe - Land Deer, MT. 5904	28-69	X	
Mena Garrison	Reserved Water Right Impact Commission	28-69	X	
DARYL WRIGHT	Governor's Office	28-69	X	
	Chip/Cree Tribes	28-69	X	

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

February 18, 1985

The thirty-second meeting of the Senate Judiciary Committee was called to order at 10:05 a.m. on February 18, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present, with the exception of Senator Tom Towe, who was excused.

CONSIDERATION OF SB 321: Senator Dave Fuller, sponsor of SB 321, stated this bill is technical. It is of interest to him because some of the sections they put in order the judge to look at certain things before allowing bail.

PROPOSERS: Marc Racicot stated he was requested by the county attorneys to come and talk about the drafting of the bill. This bill revises our system of bail and conditions of release along the lines of the federal level. SB 321 would do three things: (1) Allow judges to consider the danger a defendant poses to the community. It does not provide that the defendant be required to prove his innocence in a pretrial fashion. If there is a high risk of flight, they must apply the law very strictly. The judge must consider the risk to the safety of the community or others. (2) It would limit release in post-trial situations after conviction. It would alter it and provide bail cannot be set where it cannot be shown by clear and convincing evidence the defendant is not likely to flee or does not impose a danger to the community. (3) It articulates the conditions upon which bail can be set. A number of the conditions on pages 3 and 4 are already authorized, but they are not articulated in the statutes. Henry Loble, District Judge, First Judicial District, testified the judge should have the power after he has been convicted to keep him incarcerated for the limited period of time until he is sentenced. Mike McGrath, Lewis and Clark County Attorney, stated this bill does not deny or authorize a judge to deny bail to any defendant. The only case where you can deny bail is in a capital offense. What it does is allow the judge to impose conditions on the bail. In such situations as a domestic violence matter, a defendant might be released on his own recognizance and be ordered to stay out of bars, stay away from the home, or go to work. These conditions could be imposed even on a defendant released on his own recognizance. Gail Kline, Women's Lobbyist Fund, stated they wanted to go on record as supporting SB 321.

CLOSING STATEMENT: Senator Crippen stated rape is rape. It's a violent, heinous act made no less violent or heinous by the fact the partners are married.

Hearing on SB 294 was closed.

ACTION ON SB 294: Senator Blaylock moved SB 294 be recommended DO PASS. The motion carried unanimously.

ACTION ON SB 321: Senator Shaw moved SB 321 be recommended DO PASS. The motion carried unanimously.

ACTION ON SB 28 AND TABLING OF SB 69: Senator Mazurek stated we have agreed on everything except the due process provision as to whether a compact should be included in a preliminary decree for informational purposes or in a final decree. It is agreed we should require reports to go to the water judge; we should allow a means to file reserved water rights under the existing law; the commission should be extended; and the deadline should be taken out. Senator Mazurek asked Senator Galt if he concurred. Senator Galt responded no, but he could see the rationale for doing so. He believed the commission could still say it is too late to negotiate. Senator Crippen stated we are trying to get something done to avoid litigation. Since everyone objects to the time limitation and it seems to be a thorn under their saddle, so it should be eliminated. He believes we would be better off doing anything we can to get them to the bargaining table. Senator Mazurek stated the deadline would only apply to the Blackfoot Tribe. Senator Mazurek stated it is his recommendation that we adopt all of the amendments we talked about with the exception of the one relating to due process. Senator Galt stated they missed one--the need to extend the time to six months to get back in and file. Senator Mazurek stated the issues that remain unresolved are the Reid Chambers' amendments and the Attorney General's amendments. He felt maybe the thing to do rather than favor one side or the other is to leave the law as it is, although he thinks that is almost worse than adopting the Attorney General's amendment. Senator Yellowtail commended the chairman for allowing a second hearing on these bills. However, he stated he could not help but notice that the Attorney General's office came in after the first hearing with significant amendments which the tribes had no opportunity to see. The same thing happened with respect to the Attorney General's proposed amendments to the Chambers' amendment. The tribes were caught flat-footed again at this hearing and had not had an opportunity to see those suggestions. Senator Yellowtail stated he is concerned with the process. Senator Mazurek stated the committee could adopt the Chambers' amendment and let the House deal with any technical changes that are required. He stated we should consider extending the commission; require reports to the water judge; provide a means for reserved water right holders to file under the

current law; extend the deadline for re-entering negotiations from 60 days to six months; and insert the Reid Chambers' amendment on page 6, line 6. Senator Crippen stated that is a step towards solving the due process problem. Senator Pinsoneault stated that to the Blackfeet, this question of putting a deadline in is absolutely a red flag. He believes they will never come to the bargaining table if the bill has a deadline in it. Senator Mazurek pointed out we are taking out section 6 in its entirety. There is no prohibition against reopening negotiations now. If you put this in, you only have 30 days to do it. Senator Galt stated there is nothing allowing you to, either. Senator Mazurek suggested an amendment be adopted to that section that would say effectively don't put a 30-day requirement in "negotiations may be reopened by the parties." Senator Mazurek stated that although we may be looking into another extension in 1987, we must approach it as if this were it. We are getting to a point in the water adjudication process where we have to get this done. Mr. Petesch stated the effective date should probably be immediate, because in section 7 you are requiring a status report to the water judge. Senator Mazurek stated the commission is close to reaching a compact with the tribes, and we will need these provisions. Senator Crippen moved the amendments which have been discussed. Senator Mazurek stated Mr. Petesch would prepare a grey bill to go to the floor with copies to be provided to the committee members prior to that time. The motion to amend the bill as discussed carried unanimously. Senator Crippen moved SB 28 be recommended DO PASS AS AMENDED. The motion carried unanimously. Senator Brown moved SB 69 be TABLED. The motion carried with Senator Galt voting in opposition.

ACTION ON SB 200: Senator Towe presented proposed amendments to SB 200 (Exhibit 8), and Senator Pinsoneault also presented proposed amendments (Exhibit 9). Senator Pinsoneault explained his suggested subparagraph (2) answers the question of how to address the issue of people just throwing these into their complaints as a means of leverage or as a scare tactic. It provides that measure of caution to the attorney who would do that. Attorney fees in a situation like this could be substantial. He voiced his own personal opinion as to any cap. The jury should be able to say you did this and you should pay, without any condition or formula. Senator Pinsoneault's subparagraph (b) imposes a higher standard of proof. To a jury, they are going to do the right thing no matter the standard of proof. Senator Towe's subparagraph (b) states the standard of proof is clear and convincing. Senator Pinsoneault stated we should put the burden on the person seeking punitive damages, but keep the standard that the plaintiff has to prove in order to reap punitive damages. Senator Crippen stated he agreed. The important thing is to get this bill across. He wants to keep this bill alive even though there are five others in the House. One of the concerns presented in the testimony is wrongful discharge cases. We may have an opportunity to deal with that directly later. Senator Mazurek stated he

115

STANDING COMMITTEE REPORT

Page 1 of 5

February 18 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration SENATE BILL No. 28

first reading copy (white)
color

EXTENDING RES. WATER RIGHTS COMPACT COMMN AND CHANGES IN WATER ADJUDICATION

Respectfully report as follows: That SENATE BILL No. 28

be amended as follows:

1. Title, lines 8 through 10.

Following: "NECESSARY;" on line 8

Strike: remainder of line 8 through "UNCHANGED" on line 10

Insert: "PROVIDING AN ALTERNATE STATEMENT OF CLAIM FOR RESERVED RIGHTS
NOT YET PUT TO USE; SPECIFYING THE INFORMATION RELATING TO RESERVED
RIGHTS TO BE INCLUDED"

2. Title, line 12.

Following: "COMMISSION;"

Insert: "REQUIRING THE COMMISSION TO MAKE STATUS REPORTS TO THE WATER
JUDGE;"

3. Title, line 13.

Following: "85-2-217,"

Insert: "85-2-224,"

Following: "85-2-234,"

Strike: "AND"

Following: "85-2-702,"

Insert: "AND 85-2-704,"

*committee recon-
sidered its action
on 022085*

~~DO PASS~~

~~DO NOT PASS~~

CONTINUED

Chairman.

114

4. Page 2, line 14.

Following: line 13

Insert: "Section 2. Section 85-2-224, MCA, is amended to read:

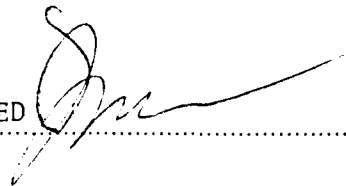
85-2-224. Statement of claim. (1) The statement of claim for each right arising under the laws of the state and for each right reserved under the laws of the United states which has been actually put to use shall include substantially the following:

- (a) the name and mailing address of the claimant;
- (b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;
- (c) the quantities of water and times of use claimed;
- (d) the legal description, with reasonable certainty, of the point or points of diversion and places of use of waters;
- (e) the purpose of use, including, if for irrigation, the number of acres irrigated;
- (f) the approximate dates of first putting water to beneficial use for the various amounts and times claimed in subsection (c); and
- (g) the sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief.

(2) The Any claimant filing a statement of claim under subsection (1) shall submit maps, plats, aerial photographs, decrees, or pertinent portions thereof, or other evidence in support of his claim. All maps, plats, or aerial photographs should show as nearly as possible to scale the point of diversion, place of use, place of storage, and other pertinent conveyance facilities.

(3) Any statement of claim for rights reserved under the laws of the United States which have not yet been put to use shall include substantially the following:

- (a) the name and mailing address of the claimant;
- (b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;
- (c) the quantities of water claimed;



(d) the priority date claimed;

(e) the laws of the United States on which the claim is based; and

(f) the sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief."

Renumber: subsection sections

5. Page 3, lines 16 and 17.

Following: "decree" on line 16

Strike: "remainder of line 16 through "purposes," on line 17

6. Page 3, lines 19 and 20.

Following: "agency" on line 19

Strike: remainder of line 19 through "congress" on line 20

7. Page 4, lines 14 and 15.

Following: "decree" on line 14

Strike: remainder of line 14 through "alteration" on line 15

~~Insert: "Provided that the water judge may, after the hearing required to be held by 85-2-233, relieve any person objecting to the compact from all its provisions. A person so relieved shall remain free to litigate all issues in the pending case without, however, receiving any assistance from any person who did not file a timely objection to the compact. Provided, further, that where a person is relieved from the provisions of a compact pursuant to this section, the compact provisions shall nonetheless be considered prima facie valid in all subsequent litigation before the water judge and any person relieved from those provisions shall carry the burden of proof on all contested issues of fact and law."~~

8. Page 4, line 22.

Following: "1973"

Insert: ", and of any federal agency or Indian tribe possessing water rights arising under federal law, required by 85-2-702 to file claims"

9. Page 4, line 25.

Following: "person"

Insert: ", federal agency, and Indian tribe"

10. Page 5, line 3.

Following: "right"

Insert: "arising under the laws of the state of Montana"

CONTINUED

118

11. Page 5, line 19.

Following: line 18

Insert: (6) For each person, tribe, or federal agency possessing water rights arising under the laws of the United States, the final decree shall state:

(a) the name and mailing address of the holder of the right;

(b) the source or sources of water included in the right;

(c) the quantity of water included in the right;

(d) the date of priority of the right;

(e) the purpose for which the water included in the right is currently used, if at all;

(f) the place of use and a description of the land, if any, to which the right is appurtenant;

(g) the place and means of diversion, if any; and

(h) any other information necessary to fully define the nature and extent of the right, including the terms of any compacts negotiated and ratified under 85-2-702."

12. Page 6, line 15.

Following: "Montana"

Strike: ","

Insert: "and"

13. Page 6, lines 16 and 17.

Following: "body" on line 16

Strike: remainder of line 16 through "authority" on line 17

14. Page 6, line 18.

Following: "its"

Strike: "approval"

Insert: "ratification"

15. Page 6, line 19.

Following: "tribe"

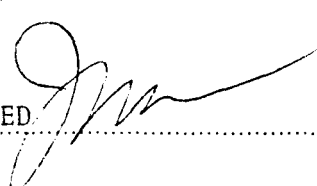
Strike: "or federal agency"

16. Page 6, lines 20 and 21.

Following: "decree"

Strike: remainder of line 20 through "purposes" on line 21

CONTINUED



17. Page 6, line 23.

Following: "decree"

Strike: "without alteration"

18. Page 6, line 24.

Following: "tribe"

Strike: "or federal agency"

19. Page 6, line 25.

Following: "all"

Strike: "federal and"

20. Page 7, line 6.

Following: line 5

Insert: Section 6. Section 85-2-704, MCA, is amended to read:

"85-2-704. Termination of negotiations. (1) The commission or any ~~other party to the negotiations~~ negotiating tribe or federal agency may terminate negotiations by providing notice to all parties 30 days in advance of the termination date. On the termination date, the suspension of the application of part 2 provided for in 85-2-217 shall also terminate. The tribe or federal agency shall file all of its claims for reserved rights within 60-days 6 months of the termination of negotiations.

(2) Once negotiations have been terminated pursuant to subsection 910, they may be reopened only by mutual agreement of the parties.

NEW SECTION. Section 7. Status reports to chief water judge. (1) The Montana reserved water rights compact commission must submit to the chief water judge, appointed pursuant to 3-7-221, a report on the status of its negotiations on July 1, 1985, and every 6 months thereafter.

(2) Each report must state which Indian tribes and federal agencies are engaged in negotiations, whether any negotiations with Indian tribes or federal agencies have been terminated, and the progress of negotiations on a tribe-by-tribe and agency-by-agency basis. The report must be made available to the public."

Renumber: subsection section

AND AS AMENDED

DO PASS


.....
Senator Joe Mazurek, Chairman

12

ROLL CALL

SENATE JUDICIARY

COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 02/8/85

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt	X		
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe			X
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels	X		
Chairman Senator Joe Mazurek	X		

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

February 18, 1985

The thirty-third meeting of the Senate Judiciary Committee was called to order at 6:00 p.m. on February 18, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

RECONSIDERATION OF AND ACTION ON SB 200: Chairman Mazurek stated a number of people were concerned about subsection (6) and section (2) of SB 200. Senator Daniels moved the committee reconsider its action in recommending SB 200 DO PASS AS AMENDED. The motion carried unanimously. Senator Pinsoneault stated there were concerns about the words "or has reason to know" in subsection (b). The scenario suggested was when you have a president of a corporation, it is a tremendous burden to impose on him the ability to know what goes on in all of his subgroups within his corporation. It was felt that was too broad. They also wanted to add the word "serious" before the word "risk." Senator Mazurek stated by the time you get to trial, you may have dropped that allegation. The bill as written allows you to penalize them at the time of filing a complaint, but not at trial. Senator Daniels stated we have amended the bill, studied it, and he believes it should be killed. It's the knee-jerk syndrome. Every time somebody says something, we react. Senator Crippen stated the testimony indicated we have to do something. If we don't do anything, at all, by what he has been told by the insurance companies, there isn't an insurance carrier in the state of Montana that will carry punitive damage insurance as a part of his coverage. The testimony indicates what really is a gap in the law. Senator Mazurek stated since the decision in Transamerica on coverage that says it is not against public policy to construe an insurance policy as not covering punitive damages, most companies will exclude punitive damages. He assumes most have already. Senator Crippen stated he has checked, and they haven't, because they are waiting to see what the legislature is going to do. Senator Pinsoneault moved the committee's prior amendment be further amended as follows:

(b) . . . Presumed malice exists when a person knows ~~or has reason to know~~ of facts which create a high degree of serious risk of harm

Senator Towe stated he would support the first part of the proposed amendment, but he is not sure about adding the word "serious." The

Senate Judiciary Committee
Minutes of the Meeting
February 18, 1985
Page 3

Title, line 6.

Following: "DATE"

Strike: remainder of line 6 through "DATE" on line 7

Page 2, line 3.

Following: "any"

Strike: proceeding begun"

Insert: "claim arising"

Following: "after"

Strike: remainder of line 3 through "act" on line 5

Insert: "October 1, 1985"

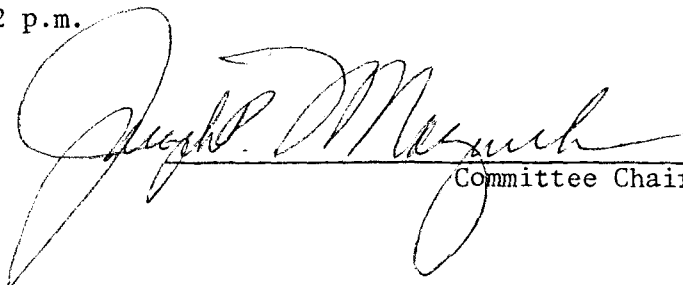
Page 2, lines 6 and 7.

Strike: section 4 in its entirety

Mr. Petesch stated if you want to combine those, you should say in the applicability section, October 1, 1985, because applicability will probably be codified. The motion to amend carried with Senator Daniels voting in opposition. Senator Pinsoneault moved SB 200 be recommended DO PASS AS AMENDED. The motion carried with Senators Daniels and Mazurek voting in opposition.

FURTHER CONSIDERATION OF SB 28: Copies of the new grey bill were distributed to the committee members for their review. The grey bill incorporated all of the amendments adopted by the committee.

There being no further business to come before the committee, the meeting was adjourned at 6:22 p.m.


Committee Chairman

ROLL CALL

SENATE JUDICIARY

COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 021885

6:00 pm

NAME	PRESENT	ABSENT	EXCUSED	--
Senator Chet Blaylock	X			
Senator Bob Brown	X			
Senator Bruce D. Crippen	X			
Senator Jack Galt	X			
Senator R. J. "Dick" Pinsoneault	X			
Senator James Shaw	X			
Senator Thomas E. Towe	X			
Senator William P. Yellowtail, Jr.	X			
Vice Chairman Senator M. K. "Kermit" Daniels	X			
Chairman Senator Joe Mazurek	X			

1 SENATE BILL NO. 28

2 INTRODUCED BY ECK

3 BY REQUEST OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

4
5 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A 2-YEAR
6 EXTENSION OF THE EXISTENCE OF THE RESERVED WATER RIGHTS
7 COMPACT COMMISSION; PROVIDING FOR FEDERAL APPROVAL OF A
8 COMPACT ONLY IF LEGALLY NECESSARY; ~~REQUIRING THAT THE TERMS~~
9 ~~OF A COMPACT SET FORTH IN A PRELIMINARY DECREE BE REPRODUCED~~
10 UNCHANGED--IN--THE--FINAL--DECREE PROVIDING AN ALTERNATE
11 STATEMENT OF CLAIM FOR RESERVED RIGHTS NOT YET PUT TO USE;
12 SPECIFYING THE INFORMATION RELATING TO RESERVED RIGHTS TO BE
13 INCLUDED IN THE FINAL DECREE; EXTENDING FROM 60 DAYS TO 6
14 MONTHS THE TIME PERIOD FOR FILING IN THE WATER COURT CLAIMS
15 UNRESOLVED BY THE COMPACT COMMISSION; REQUIRING THE
16 COMMISSION TO MAKE STATUS REPORTS TO THE WATER JUDGE;
17 AMENDING SECTIONS 85-2-217, 85-2-224, 85-2-231, 85-2-234,
18 AND 85-2-702, AND 85-2-704, MCA; AND PROVIDING AN IMMEDIATE
19 EFFECTIVE DATE."
20

21 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

22 Section 1. Section 85-2-217, MCA, is amended to read:
23 "85-2-217. Suspension of adjudication. While
24 negotiations for the conclusion of a compact under part 7
25 are being pursued, all proceedings to generally adjudicate

1 reserved Indian water rights and federal reserved water
2 rights of those tribes and federal agencies which are
3 negotiating are suspended. The obligation to file water
4 rights claims for those reserved rights is also suspended.
5 This suspension shall be effective until July 1, ~~1985~~ 1987,
6 as long as negotiations are continuing or ratification of a
7 completed compact is being sought. If approval by the state
8 legislature and tribes or federal agencies has not been
9 accomplished by July 1, ~~1985~~ 1987, the suspension shall
10 terminate on that date. Upon termination of the suspension
11 of this part, the tribes and the federal agencies shall be
12 subject to the special filing requirements of 85-2-702(3)
13 and all other requirements of the state water adjudication
14 system provided for in Title 85, chapter 2. Those tribes and
15 federal agencies that choose not to negotiate their reserved
16 water rights shall be subject to the full operation of the
17 state adjudication system and may not benefit from the
18 suspension provisions of this section."

19 SECTION 2. SECTION 85-2-224, MCA, IS AMENDED TO READ:

20 "85-2-224. Statement of claim. (1) The statement of
21 claim for each right arising under the laws of the state and
22 for each right reserved under the laws of the United States
23 which has been actually put to use shall include
24 substantially the following:

25 (a) the name and mailing address of the claimant;

(b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;

(c) the quantities of water and times of use claimed;

(d) the legal description, with reasonable certainty, of the point or points of diversion and places of use of waters;

(e) the purpose of use, including, if for irrigation, the number of acres irrigated;

(f) the approximate dates of first putting water to beneficial use for the various amounts and times claimed in subsection (c); and

(g) the sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief.

(2) The Any claimant filing a statement of claim under subsection (1) shall submit maps, plats, aerial photographs, decrees, or pertinent portions thereof, or other evidence in support of his claim. All maps, plats, or aerial photographs should show as nearly as possible to scale the point of diversion, place of use, place of storage, and other pertinent conveyance facilities.

(3) Any statement of claim for rights reserved under the laws of the United States which have not yet been put to use shall include substantially the following:

127

1 (a) the name and mailing address of the claimant;

2 (b) the name of the watercourse or water source from
3 which the right to divert or make use of water is claimed,
4 if available;

5 (c) the quantities of water claimed;

6 (d) the priority date claimed;

7 (e) the laws of the United States on which the claim
8 is based; and

9 (f) the sworn statement that the claim set forth is
10 true and correct to the best of claimant's knowledge and
11 belief."

12 Section 3. Section 85-2-231, MCA, is amended to read:

13 "85-2-231. Preliminary decree. (1) The water judge
14 shall issue a preliminary decree. The preliminary decree
15 shall be based on:

16 (a) the statements of claim before the water judge;

17 (b) the data submitted by the department;

18 (c) the contents of compacts approved by the Montana
19 legislature and the tribe or federal agency or, lacking an
20 approved compact, the filings for federal and Indian
21 reserved rights; and

22 (d) any additional data obtained by the water judge.
23 The preliminary decree shall be issued within 90 days after
24 the close of the special filing period set out in
25 85-2-702(3) or as soon thereafter as is reasonably feasible.

1 This section does not prevent the water judge from issuing
2 an interlocutory decree or other temporary decree if such a
3 decree is necessary for the orderly administration of water
4 rights prior to the issuance of a preliminary decree.

5 (2) A preliminary decree may be issued for any
6 hydrologically interrelated portion of a water division,
7 including but not limited to a basin, subbasin, drainage,
8 subdrainage, stream, or single source of supply of water, at
9 a time different from the issuance of other preliminary
10 decrees or portions of the same decree.

11 (3) The preliminary decree shall contain the
12 information and make the determinations, findings, and
13 conclusions required for the final decree under 85-2-234.
14 The water judge shall include in the preliminary decree ~~7-for~~
15 ~~informational purposes,~~ the contents of a compact negotiated
16 under the provisions of part 7 that has been approved by the
17 legislature and the tribe or federal agency ~~whether-or-not~~
18 ~~it-has-been-ratified-by-congress.~~

19 (4) If the water judge is satisfied that the report of
20 the water master meets the requirements for the preliminary
21 decree set forth in subsections (1) and (3), and is
22 satisfied with the conclusions contained in the report, the
23 water judge shall adopt the report as the preliminary
24 decree. If the water judge is not so satisfied, he may, at
25 his option, recommit the report to the master with

1 instructions, or modify the report and issue the preliminary
2 decree."

3 Section 4. Section 85-2-234, MCA, is amended to read:

4 "85-2-234. Final decree. (1) The water judge shall, on
5 the basis of the preliminary decree and on the basis of any
6 hearing that may have been held, enter a final decree
7 affirming or modifying the preliminary decree. If no
8 request for a hearing is filed within the time allowed, the
9 preliminary decree automatically becomes final, and the
10 water judge shall enter it as the final decree.

11 (2) The terms of a compact negotiated and ratified
12 under 85-2-702 must be included in the final decree without
13 alteration. PROVIDED THAT THE WATER JUDGE MAY, AFTER THE
14 HEARING REQUIRED TO BE HELD BY 85-2-233, RELIEVE ANY PERSON
15 OBJECTING TO THE COMPACT FROM ALL ITS PROVISIONS. A PERSON
16 SO RELIEVED SHALL REMAIN FREE TO LITIGATE ALL ISSUES IN THE
17 PENDING CASE WITHOUT, HOWEVER, RECEIVING ANY ASSISTANCE FROM
18 ANY PERSON WHO DID NOT FILE A TIMELY OBJECTION TO THE
19 COMPACT. PROVIDED, FURTHER, THAT WHERE A PERSON IS RELIEVED
20 FROM THE PROVISIONS OF A COMPACT PURSUANT TO THIS SECTION,
21 THE COMPACT PROVISIONS SHALL NONETHELESS BE CONSIDERED PRIMA
22 FACIE VALID IN ALL SUBSEQUENT LITIGATION BEFORE THE WATER
23 JUDGE AND ANY PERSON RELIEVED FROM THOSE PROVISIONS SHALL
24 CARRY THE BURDEN OF PROOF ON ALL CONTESTED ISSUES OF FACT
25 AND LAW.

1 ~~†2†~~(3) The final decree shall establish the existing
2 rights and priorities within the water judge's jurisdiction
3 of persons required by 85-2-221 to file a claim for an
4 existing right, and of persons required to file a
5 declaration of existing rights in the Powder River Basin
6 pursuant to an order of the department or a district court
7 issued under sections 8 and 9 of Chapter 452, Laws of 1973,
8 AND OF ANY FEDERAL AGENCY OR INDIAN TRIBE POSSESSING WATER
9 RIGHTS ARISING UNDER FEDERAL LAW, REQUIRED BY 85-2-702 TO
10 FILE CLAIMS.

11 ~~†3†~~(4) The final decree shall state the findings of
12 fact, along with any conclusions of law, upon which the
13 existing rights and priorities of each person, FEDERAL
14 AGENCY, AND INDIAN TRIBE named in the decree are based.

15 ~~†4†~~(5) For each person who is found to have an
16 existing right ARISING UNDER THE LAWS OF THE STATE OF
17 MONTANA, the final decree shall state:

18 (a) the name and post-office address of the owner of
19 the right;

20 (b) the amount of water, rate, and volume, included in
21 the right;

22 (c) the date of priority of the right;

23 (d) the purpose for which the water included in the
24 right is used;

25 (e) the place of use and a description of the land, if

1 any, to which the right is appurtenant;

2 (f) the source of the water included in the right;

3 (g) the place and means of diversion;

4 (h) the inclusive dates during which the water is used
5 each year;

6 (i) any other information necessary to fully define
7 the nature and extent of the right.

8 (6) FOR EACH PERSON, TRIBE, OR FEDERAL AGENCY
9 POSSESSING WATER RIGHTS ARISING UNDER THE LAWS OF THE UNITED
10 STATES, THE FINAL DECREE SHALL STATE:

11 (A) THE NAME AND MAILING ADDRESS OF THE HOLDER OF THE
12 RIGHT;

13 (B) THE SOURCE OR SOURCES OF WATER INCLUDED IN THE
14 RIGHT;

15 (C) THE QUANTITY OF WATER INCLUDED IN THE RIGHT;

16 (D) THE DATE OF PRIORITY OF THE RIGHT;

17 (E) THE PURPOSE FOR WHICH THE WATER INCLUDED IN THE
18 RIGHT IS CURRENTLY USED, IF AT ALL;

19 (F) THE PLACE OF USE AND A DESCRIPTION OF THE LAND, IF
20 ANY, TO WHICH THE RIGHT IS APPURTENANT;

21 (G) THE PLACE AND MEANS OF DIVERSION, IF ANY;

22 (H) ANY OTHER INFORMATION NECESSARY TO FULLY DEFINE
23 THE NATURE AND EXTENT OF THE RIGHT, INCLUDING THE TERMS OF
24 ANY COMPACTS NEGOTIATED AND RATIFIED UNDER 85-2-702."

25 Section 5. Section 85-2-702, MCA, is amended to read:

1 "85-2-702. Negotiation with Indian tribes. (1) The
 2 reserved water rights compact commission, created by
 3 2-15-212, may negotiate with the Indian tribes or their
 4 authorized representatives jointly or severally to conclude
 5 compacts authorized under 85-2-701. Compact proceedings
 6 shall be commenced by the commission. The commission shall
 7 serve by certified mail directed to the governing body of
 8 each tribe a written request for the initiation of
 9 negotiations under this part and a request for the
 10 designation of an authorized representative of the tribe to
 11 conduct compact negotiations. Upon receipt of such written
 12 designation from the governing body of a tribe, compact
 13 negotiations shall be considered to have commenced.

14 (2) When the compact commission and the Indian tribes
 15 or their authorized representatives have agreed to a
 16 compact, they shall sign a copy and file an original copy
 17 with the department of state of the United States of America
 18 and copies with the secretary of state of Montana and with
 19 the governing body for the tribe involved. The compact is
 20 effective and binding upon all parties upon ratification by
 21 the legislature of Montana, AND any affected tribal
 22 governing body, ~~--and, if legally necessary, the congress of~~
 23 ~~the United States or other appropriate federal authority.~~

24 (3) Upon its approval RATIFICATION by the Montana
 25 legislature and the tribe ~~or federal agency~~, the terms of a

compact must be included in the preliminary decree for
informational--purposes as provided by 85-2-231, and unless
renegotiated, the terms of the compact must be included in
the final decree without-alteration. However, if approval of
the state legislature and tribe ~~or-federal-agency~~ has not
been accomplished by July 1, ~~1985~~ 1987, all ~~federal--and~~
Indian claims for reserved water rights that have not been
resolved by a compact must be filed with the department
within ~~60-days~~ 6 months. These new filings shall be used in
the formulation of the preliminary decree and shall be given
treatment similar to that given to all other filings."

SECTION 6. SECTION 85-2-704, MCA, IS AMENDED TO READ:

"85-2-704. Termination of negotiations. (1) The
commission or any ~~other---party---to---the---negotiations~~
negotiating tribe or federal agency may terminate
negotiations by providing notice to all parties 30 days in
advance of the termination date. On the termination date,
the suspension of the application of part 2 provided for in
85-2-217 shall also terminate. The tribe or federal agency
shall file all of its claims for reserved rights within ~~60~~
~~days~~ 6 months of the termination of negotiations.

(2) Once negotiations have been terminated pursuant to
subsection (1), they may be reopened only by mutual
agreement of the parties."

THERE IS A NEW MCA SECTION THAT READS:

1 NEW SECTION. Section 7. Status reports to chief water
2 judge. (1) The Montana reserved water rights compact
3 commission must submit to the chief water judge, appointed
4 pursuant to 3-7-221, a report on the status of its
5 negotiations on July 1, 1985, and every 6 months thereafter.

6 (2) Each report must state which Indian tribes and
7 federal agencies are engaged in negotiations, whether any
8 negotiations with Indian tribes or federal agencies have
9 been terminated, and the progress of negotiations on a
10 tribe-by-tribe and agency-by-agency basis. The report must
11 be made available to the public.

12 NEW SECTION. Section 8. Effective date. This act is
13 effective on passage and approval.

-End-

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

February 20, 1985

The thirty-fifth meeting of the Senate Judiciary Committee was called to order at 10:08 a.m. on February 20, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol.

ROLL CALL: All committee members were present.

CONSIDERATION OF SB 375: Senator Thomas E. Towe, sponsor of the bill, said that these three bills that are to be heard today come about through a great deal of effort on the part of a number of individuals. Senator Towe said there has been great concern that the seriously mentally ill, which is the only type of person that can be committed involuntarily to Warm Springs, that we are so rigid that there are some people who aren't adequately taken care of. The words "must be a threat" or "must pose an imminent danger", require very high standards and it is very difficult. If someone is not inclined to harm anyone or harm themselves, they probably cannot be committed to Warm Springs. That's Constitutional. These three bills try to reach that category of person who may not meet that very high standard of danger to themselves or someone else or imminent threat to danger, and yet nevertheless need help and could use it if we could force them to have it. The issue is whether we should ever force anyone to take treatment if they aren't going to harm anyone else. What we have proposed to do is to attack the problem from three areas. First, in SB 375, which encourages a use of a probationary period following release from Warm Springs. Senator Towe said 50% of these people following release for one reason or another have come into trouble and had to be committed again. We are hoping with this bill to address some 50% of the problem. Secondly, in 376, we are proposing to create a new standard, a new category, a person who needs treatment but is not seriously mentally ill. We are requesting that that person not be committed to Warm Springs, but may be required to submit to treatment for 30 days or a possible extension for another 30 days. That one is probably the most controversial of the three bills. Third, we are proposing to address the person who really has a property problem. They wouldn't hurt anyone, but they may have a substantial impact on his or her property. Where no-one is willing to come forward to act as a conservator, we are proposing to make the public administrator the conservator in those situations. That's the essence of the three bills. Senator Towe then told the committee about the people who worked on the three bills. This bill refers to the probationary period after leaving Warm Springs. This is the person who has already been found seriously mentally ill. Judge Bennett

134

children will be monitored by professionals 24 hours per day. He said the children will get to have recreation out in the yard right there in downtown Billings, and that it will be handled similar to what Warm Springs is. He said many professionals helped in the design of the building.

The hearing on SB 411 is closed.

FURTHER CONSIDERATION ON SB 28: Marcia Rundle asked the committee to reconsider the action it took on Wednesday. Ms. Rundle said she was very surprised at the turn the hearing took. Ms. Rundle would like the committee to reconsider the amendment known as the Chambers amendment. She said that she is not speaking on behalf of the Montana Reserved Water Rights Compact Commission, but that she has the support of every member she has talked to. Ms. Rundle entered written testimony which is attached hereto marked Exhibit 8. The Compact Commission prefers that it leave the statutory process created by SB 76 as it is. Ms. Rundle believes the Attorney General's office is not opposed to leaving the statute as it is. She said it is ambiguous the way it is. She felt her special objections cannot be made in the water courts. The challenge of due process should not be made by allowing substantive matters to be changed in the water court. Only the courts can decide that. Ms. Rundle believes neither the "for informational purposes" or the Reid Chambers' amendment should be adopted.

Clay Smith, Attorney General's office, had no objection to the statute remaining as it is. The amendment was to address the concerns raised by the tribes. On Friday, he forwarded to Reid Chambers the Attorney General's proposed amendments thereto and they discussed them at length regarding the proposed changes to the statute. He felt Reid Chambers was uncomfortable with his own language. However, he can't state that they have agreed to any new provisions.

Senator Mazurek said that he had spoken with Cal Wilson of the Northern Cheyenne Tribes, and that Mr. Wilson is actively involved in regulations put in by the legislative process. He said he could not understand why anyone would go along with the Chambers amendment because of the due process issue. Senator Mazurek asked what is your reaction if we leave the existing language as it is and what would be the tribe's reaction? Senator Yellowtail replied that he is not a lawyer. However, he thinks that may be the safe thing to do. He felt it would be better for the committee to leave the situation as it is rather than to do something that is questionable. He doesn't feel they should have hearings after the hearing. Senator Mazurek said that they are trying to balance a lot of interests and they have a lot at stake. Senator Towe said that the part of the Chambers amendment he is concerned about are on the gray bill. Senator Towe suggested adding after

137

compact on line 15 "on the basis of procedural errors is". Marcia said she has a problem with the concept of relieving people from the terms of the compact. Senator Mazurek said that when they hold a second hearing, they want to go through with a bill that does not upset the apple cart. It extends the commission and does not include provisions to which both sides don't agree. If we do that, we leave open the question of what happens to the compact in the preliminary decree. The tribes will argue this one without the compact. The commission will argue the same thing, and the Attorney General's office would argue otherwise. Senator Mazurek said that this is such a critical issue and is so delicate politically that we should leave things as they are. He said their premise will be that they are not going to change the law unless there is agreement on all sides so they will not give unfair advantage to anyone.

Senator Towe made a motion to reconsider their action in recommending SB 28 do pass as amended. With Senator Crippen voting no, the rest of the committee voted aye, so the motion was adopted.

Senator Yellowtail moved to strike the Chambers' amendment. With Senator Crippen voting no, the rest of the committee voted aye, so the motion was adopted.

Senator Towe moved that SB 28 do pass as amended. With Senator Crippen voting no, and the rest of the committee voting aye,
SENATE BILL 28 DO PASS AS AMENDED.

The meeting was adjourned at 12:27 p.m.



SENATOR JOE MAZUREK, CHAIRMAN

ROLL CALL

SENATE JUDICIARY

COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 0226

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt	X		
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe	X		
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels	X		
Chairman Senator Joe Mazurek	X		

STANDING COMMITTEE REPORT

Page 1 of 5

February 20

1985

MR. PRESIDENT

JUDICIARY

We, your committee on.....

SENATE BILL

23

having had under consideration..... No.....

first reading copy (white)
color

EXTENDING RES. WATER RIGHTS COMPACT COVEN AND CHANGES IN WATER ADJUDICATION.

SENATE BILL

28

Respectfully report as follows: That..... No.....

be amended as follows:

1. Title, lines 8 through 10.

Following: "NECESSARY;" on line 8

Strike: remainder of line 8 through "UNCHANGED" on line 10

Insert: "PROVIDING AN ALTERNATE STATEMENT OF CLAIM FOR RESERVED RIGHTS
NOT YET PUT TO USE; SPECIFYING THE INFORMATION RELATING TO RESERVED
RIGHTS TO BE INCLUDED "

2. Title, line 12.

Following: "COMMISSION;"

Insert: "REQUIRING THE COMMISSION TO MAKE STATUS REPORTS TO THE WATER
JUDGE;"

3. Title, line 13.

Following: "85-2-217,"

Insert: "85-2-224,"

Following: "85-2-234,"

Strike: "AND"

Following: "85-2-702,"

Insert: "AND 85-2-704,"

BEST COPY.
AVAILABLE

XXXXXX

XXXXXXXXXX

Senator Joe Mazurek

Chairman.

140

4. Page 2, line 14.

Following: line 13

Insert: "Section 2. Section 35-2-224, MCA, is amended to read:

35-2-224. Statement of claim. (1) The statement of claim for each right arising under the laws of the state and for each right reserved under the laws of the United States which has been actually put to use shall include substantially the following:

- (a) the name and mailing address of the claimant;
- (b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;
- (c) the quantities of water and times of use claimed;
- (d) the legal description, with reasonable certainty, of the point or points of diversion and places of use of waters;
- (e) the purpose of use, including, if for irrigation, the number of acres irrigated;
- (f) the approximate dates of first putting water to beneficial use for the various amounts and times claimed in subsection (c); and
- (g) the sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief.

(2) The Any claimant filing a statement of claim under subsection (1) shall submit maps, plats, aerial photographs, decrees, or pertinent portions thereof, or other evidence in support of his claim. All maps, plats, or aerial photographs should show as nearly as possible to scale the point of diversion, place of use, place of storage, and other pertinent conveyance facilities.

(3) Any statement of claim for rights reserved under the laws of the United States which have not yet been put to use shall include substantially the following:

- (a) the name and mailing address of the claimant;
- (b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;
- (c) the quantities of water claimed;

BEST COPY
AVAILABLE

CONTINUED

(d) the priority date claimed;

(e) the laws of the United States on which the claim is based; and

(f) the sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief."

Remember: subsection sections

5. Page 3, lines 16 and 17.

Following: "decree" on line 16

Strike: "remainder of line 16 through "purposes," on line 17

6. Page 3, lines 19 and 20.

Following: "agency" on line 19

Strike: remainder of line 19 through "congress" on line 20

7. Page 4, lines 14 and 15.

Following: "decree" on line 14

Strike: remainder of line 14 through "alteration" on line 15

8. Page 4, line 22.

Following: "1973"

Insert: ", and of any federal agency or Indian tribe possessing water rights arising under federal law, required by 85-2-702 to file claims"

9. Page 4, line 25.

Following: "person"

Insert: ", federal agency, and Indian tribe"

10. Page 5, line 3.

Following: "right"

Insert: "arising under the laws of the state of Montana"

BEST COPY
AVAILABLE

CONTINUED

142

11. Page 5, line 19.

Following: line 18

Insert: (6) For each person, tribe, or federal agency possessing water rights arising under the laws of the United States, the final decrees shall state:

- (a) the name and mailing address of the holder of the right;
- (b) the source or sources of water included in the right;
- (c) the quantity of water included in the right;
- (d) the date of priority of the right;
- (e) the purpose for which the water included in the right is currently used, if at all;
- (f) the place of use and a description of the land, if any, to which the right is appurtenant;
- (g) the place and means of diversion, if any; and
- (h) any other information necessary to fully define the nature and extent of the right, including the terms of any contracts negotiated and ratified under 85-2-702."

12. Page 6, line 15.

Following: "Montana"

Strike: ", "

Insert: "and"

13. Page 6, lines 16 and 17.

Following: "body" on line 16

Strike: remainder of line 16 through "authority" on line 17

14. Page 6, line 18.

Following: "its"

Strike: "approval"

Insert: "ratification"

15. Page 6, line 19.

Following: "tribe"

Strike: "or federal agency"

16. Page 6, lines 20 and 21.

Following: "decree"

Strike: remainder of line 20 through "Purposes" on line 21

BEST COPY
AVAILABLE

17. Page 6, line 23.

Following: "decree"

Strike: "without alteration"

18. Page 6, line 24.

Following: "tribe"

Strike: "or federal agency"

19. Page 6, line 25.

Following: "all"

Strike: "federal and"

20. Page 7, line 6.

Following: line 5

Insert: Section 6. Section 85-2-704, MCA, is amended to read:

85-2-704. Termination of negotiations. (1) The commission or any other-party-to-the-negotiations negotiating tribe or federal agency may terminate negotiations by providing notice to all parties 30 days in advance of the termination date. On the termination date, the suspension of the application of part 2 provided for in 85-2-217 shall also terminate. The tribe or federal agency shall file all of its claims for reserved rights within 60-days 6 months of the termination of negotiations.

(2) Once negotiations have been terminated pursuant to subsection 910, they may be reopened only by mutual agreement of the parties.

NEW SECTION. Section 7. Status reports to chief water judge. (1) The Montana reserved water rights compact commission must submit to the chief water judge, appointed pursuant to 3-7-221, a report on the status of its negotiations on July 1, 1985, and every 6 months thereafter.

(2) Each report must state which Indian tribes and federal agencies are engaged in negotiations, whether any negotiations with Indian tribes or federal agencies have been terminated, and the progress of negotiations on a tribe-by-tribe and agency-by-agency basis. The report must be made available to the public."

Remember: subsection section

AND AS AMENDED

DO PASS

BEST COPY
AVAILABLE

February 19, 1985

Senate Judiciary Committee
Montana State Capitol
Helena, Montana 59620

Gentlemen:

The Montana Reserved Water Rights Compact Commission and the negotiations process were created by Senate Bill 76 as an alternative to litigation of federal reserved rights in state court. This compromise was perceived to be in the best interests of the state, the federal agencies, and the Indian Tribes of Montana. I am concerned about the potential effect of the proposed amendments on the negotiations process. In my opinion, opening the compacts to objection in the water court as to the substantive provisions that have been agreed upon after long and difficult negotiations will substantially diminish the value of the process as an alternative to litigation.

The goal of all parties is to provide finality to the negotiations process without violating the due process rights of citizens and without jeopardizing the state adjudications process.

If a state water user raises a due process challenge to the terms of a compact, his action is one against the state for compensation. The proposed amendments would meet that challenge by providing that a water user could object to the substantive provisions of a compact in the water court. I do not believe that this is necessary. The U.S. Supreme Court has affirmed that sovereigns can bind their citizens to the terms of compacts apportioning water. It is the legislative act of ratification which binds the citizens of the state and the tribe; therefore, it is within the legislative process that due process must be provided.

The state has jurisdiction to adjudicate federal reserved water rights under the McCarran Amendment only if we have an adequate general stream adjudication process. Assuming that the Montana Supreme Court finds, in the case now pending, that the SB 76 process is an adequate general stream adjudication, our concern is that new amendments do not jeopardize that adequacy. A state water user will very likely not be challenging the adequacy of the process to adjudicate federal reserved water rights; presumably, he will be arguing a perceived effect of the compact on his own water rights. But assuming that at some point the issue is raised as to whether the process is a general stream adjudication, under the McCarran Amendment, when every water user cannot challenge the federal rights in the water court, then a court will have to determine whether the process is inadequate because those rights were determined through a compact process rather than through litigation. That decision also rests, it seems to me, on the power of the state and the tribe or the United States

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 8

DATE 022085

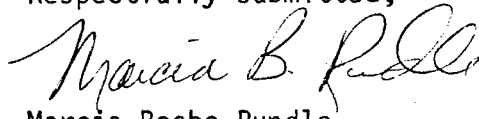
BILL NO. SB 28

145

to bind their citizens to the terms of a negotiated compact and to settle pending litigation through compromise.

As a practical matter, if the proposed amendment is adopted, I expect that attorneys would advise clients to challenge compacts in the preliminary decree hearings, just to be on the safe side. Assuming that the objections would be to the quantification of federal rights in the compact, the resulting deliberations could be as technically complex, lengthy, and expensive as litigation on the issue in the first instance. Moreover, because quantification agreed upon in a compact will be based in part on mutual concessions on other issues, challenges and modifications in the water court will necessarily undermine other provisions. This prospect, in my opinion, greatly reduces the viability of the negotiations process as an alternative to litigation.

Respectfully submitted,



Marcia Beebe Rundle
Attorney

MBR;jf

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 8
DATE 022085
BILL NO. SB 28

CLERICAL

Date: 2/21

Senate Bill 28

Time: 8:20 pm

In accordance with Joint Rule 3-7(b) the following clerical errors may be corrected:

Senate Standing Committee Report

Amendment #20

in (2) "pursuant to subsection (1),"
^

2:20 p.m

2/22/85

[Signature]
Sponsor

Secretary of Senate
or
Chief Clerk

Legislative Council

MER

14

STATUS SHEETFORTY-NINTH

LEGISLATIVE SESSION

House COMMITTEE ON JUDICIARY

SENATE BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMEND. DATE	BE CON- CURRED IN DATE	BE CONC. IN AS AMENDED DATE	BE NOT CON- CURRED IN DATE
SB 5	1/18/85	3/7/85	2/7/85				2/7/85		
SB 26	1/19/85	3/11/85 3/12/85	(Tabled 3/12/85)			Reconsidered 3/28/85	and passed out with BE	CONCURRED IN AS AMENDED	
SB 57	1/22/85	3/7/85	3/7/85				3/7/85		
SB 27	1/23/85	3/8/85	3/8/85				3/8/85		
SB 80	1/24/85	3/11/85	3/11/85				3/11/85		
SB 2	1/26/85	3/6/85 3/7/85	(TABLED 3/7/85)						
SB 3	1/28/85	3/6/85 3/7/85	3/7/85				3/7/85		
SB 85	1/28/85	3/8/85	3/11/85				3/8/85		
SB 90	1/28/85	3/8/85 3/11/85	3/11/85					3/11/85	
SB 91	1/28/85	3/7/85 3/8/85	3/8/85					3/8/85	
SB 60	1/29/85	3/7/85 3/8/85	3/8/85				3/8/85		
SB 87	1/29/85	3/7/85	3/7/85				3/7/85		
SB 28	2/27/85	3/12/85 3/22/85	3/22/85					3/22/85	
SB 54	2/27/85	3/12/85	3/12/85					3/12/85	
SB 89	2/27/85	3/12/85 3/19/85	3/19/85					3/19/85	
SB 104	2/27/85	3/11/85	3/11/85				3/11/85		

SENATE BILL NO. 28

INTRODUCED BY ECK

BY REQUEST OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A 2-YEAR EXTENSION OF THE EXISTENCE OF THE RESERVED WATER RIGHTS COMPACT COMMISSION; PROVIDING FOR FEDERAL APPROVAL OF A COMPACT ONLY IF LEGALLY NECESSARY; ~~REQUIRING THAT THE TERMS OF A COMPACT SET FORTH IN A PRELIMINARY DECREE BE REPRODUCED UNCHANGED~~ PROVIDING AN ALTERNATE STATEMENT OF CLAIM FOR RESERVED RIGHTS NOT YET PUT TO USE; SPECIFYING THE INFORMATION RELATING TO RESERVED RIGHTS TO BE INCLUDED; IN THE FINAL DECREE EXTENDING FROM 60 DAYS TO 6 MONTHS THE TIME PERIOD FOR FILING IN THE WATER COURT CLAIMS UNRESOLVED BY THE COMPACT COMMISSION; REQUIRING THE COMMISSION TO MAKE STATUS REPORTS TO THE WATER JUDGE; AMENDING SECTIONS 85-2-217, 85-2-224, 85-2-231, 85-2-234, AND 85-2-702, AND 85-2-704, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-217, MCA, is amended to read:

"85-2-217. Suspension of adjudication. While negotiations for the conclusion of a compact under part 7 are being pursued, all proceedings to generally adjudicate reserved Indian water rights and federal reserved water

rights of those tribes and federal agencies which are negotiating are suspended. The obligation to file water rights claims for those reserved rights is also suspended. This suspension shall be effective until July 1, 1985 1987, as long as negotiations are continuing or ratification of a completed compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, 1985 1987, the suspension shall terminate on that date. Upon termination of the suspension of this part, the tribes and the federal agencies shall be subject to the special filing requirements of 85-2-702(3) and all other requirements of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies that choose not to negotiate their reserved water rights shall be subject to the full operation of the state adjudication system and may not benefit from the suspension provisions of this section."

SECTION 2. SECTION 85-2-224, MCA, IS AMENDED TO READ:

"85-2-224. Statement of claim. (1) The statement of claim for each right arising under the laws of the state and for each right reserved under the laws of the United States which has been actually put to use shall include substantially the following:

- (a) the name and mailing address of the claimant;
- (b) the name of the watercourse or water source from

1 which the right to divert or make use of water is claimed,
2 if available;

3 (c) the quantities of water and times of use claimed;

4 (d) the legal description, with reasonable certainty,
5 of the point or points of diversion and places of use of
6 waters;

7 (e) the purpose of use, including, if for irrigation,
8 the number of acres irrigated;

9 (f) the approximate dates of first putting water to
10 beneficial use for the various amounts and times claimed in
11 subsection (c); and

12 (g) the sworn statement that the claim set forth is
13 true and correct to the best of claimant's knowledge and
14 belief.

15 (2) The Any claimant filing a statement of claim under
16 subsection (1) shall submit maps, plats, aerial photographs,
17 decrees, or pertinent portions thereof, or other evidence in
18 support of his claim. All maps, plats, or aerial
19 photographs should show as nearly as possible to scale the
20 point of diversion, place of use, place of storage, and
21 other pertinent conveyance facilities.

22 (3) Any statement of claim for rights reserved under
23 the laws of the United States which have not yet been put to
24 use shall include substantially the following:

25 (a) the name and mailing address of the claimant;

1 (b) the name of the watercourse or water source from
2 which the right to divert or make use of water is claimed,
3 if available;

4 (c) the quantities of water claimed;

5 (d) the priority date claimed;

6 (e) the laws of the United States on which the claim
7 is based; and

8 (f) the sworn statement that the claim set forth is
9 true and correct to the best of claimant's knowledge and
10 belief."

11 Section 3. Section 85-2-231, MCA, is amended to read:

12 "85-2-231. Preliminary decree. (1) The water judge
13 shall issue a preliminary decree. The preliminary decree
14 shall be based on:

15 (a) the statements of claim before the water judge;

16 (b) the data submitted by the department;

17 (c) the contents of compacts approved by the Montana
18 legislature and the tribe or federal agency or, lacking an
19 approved compact, the filings for federal and Indian
20 reserved rights; and

21 (d) any additional data obtained by the water judge.
22 The preliminary decree shall be issued within 90 days after
23 the close of the special filing period set out in
24 85-2-702(3) or as soon thereafter as is reasonably feasible.
25 This section does not prevent the water judge from issuing

1 an interlocutory decree or other temporary decree if such a
2 decree is necessary for the orderly administration of water
3 rights prior to the issuance of a preliminary decree.

4 (2) A preliminary decree may be issued for any
5 hydrologically interrelated portion of a water division,
6 including but not limited to a basin, subbasin, drainage,
7 subdrainage, stream, or single source of supply of water, at
8 a time different from the issuance of other preliminary
9 decrees or portions of the same decree.

10 (3) The preliminary decree shall contain the
11 information and make the determinations, findings, and
12 conclusions required for the final decree under 85-2-234.
13 The water judge shall include in the preliminary decree ~~for~~
14 ~~informational purposes~~ the contents of a compact negotiated
15 under the provisions of part 7 that has been approved by the
16 legislature and the tribe or federal agency ~~whether or not~~
17 ~~it has been ratified by congress.~~

18 (4) If the water judge is satisfied that the report of
19 the water master meets the requirements for the preliminary
20 decree set forth in subsections (1) and (3), and is
21 satisfied with the conclusions contained in the report, the
22 water judge shall adopt the report as the preliminary
23 decree. If the water judge is not so satisfied, he may, at
24 his option, recommit the report to the master with
25 instructions, or modify the report and issue the preliminary

1 decree."

2 Section 4. Section 85-2-234, MCA, is amended to read:

3 "85-2-234. Final decree. (1) The water judge shall, on
4 the basis of the preliminary decree and on the basis of any
5 hearing that may have been held, enter a final decree
6 affirming or modifying the preliminary decree. If no
7 request for a hearing is filed within the time allowed, the
8 preliminary decree automatically becomes final, and the
9 water judge shall enter it as the final decree.

10 (2) The terms of a compact negotiated and ratified
11 under 85-2-702 must be included in the final decree without
12 alteration.

13 ~~(2)(3)~~ (3) The final decree shall establish the existing
14 rights and priorities within the water judge's jurisdiction
15 of persons required by 85-2-221 to file a claim for an
16 existing right, and of persons required to file a
17 declaration of existing rights in the Powder River Basin
18 pursuant to an order of the department or a district court
19 issued under sections 8 and 9 of Chapter 452, Laws of 1973,
20 AND OF ANY FEDERAL AGENCY OR INDIAN TRIBE POSSESSING WATER
21 RIGHTS ARISING UNDER FEDERAL LAW, REQUIRED BY 85-2-702 TO
22 FILE CLAIMS.

23 ~~(3)(4)~~ (4) The final decree shall state the findings of
24 fact, along with any conclusions of law, upon which the
25 existing rights and priorities of each person, FEDERAL

1 AGENCY, AND INDIAN TRIBE named in the decree are based.

2 ~~††~~(5) For each person who is found to have an
3 existing right ARISING UNDER THE LAWS OF THE STATE OF
4 MONTANA, the final decree shall state:

5 (a) the name and post-office address of the owner of
6 the right;

7 (b) the amount of water, rate, and volume, included in
8 the right;

9 (c) the date of priority of the right;

10 (d) the purpose for which the water included in the
11 right is used;

12 (e) the place of use and a description of the land, if
13 any, to which the right is appurtenant;

14 (f) the source of the water included in the right;

15 (g) the place and means of diversion;

16 (h) the inclusive dates during which the water is used
17 each year;

18 (i) any other information necessary to fully define
19 the nature and extent of the right.

20 (6) FOR EACH PERSON, TRIBE, OR FEDERAL AGENCY
21 POSSESSING WATER RIGHTS ARISING UNDER THE LAWS OF THE UNITED
22 STATES, THE FINAL DECREE SHALL STATE:

23 (A) THE NAME AND MAILING ADDRESS OF THE HOLDER OF THE
24 RIGHT;

25 (B) THE SOURCE OR SOURCES OF WATER INCLUDED IN THE

1 RIGHT;

2 (C) THE QUANTITY OF WATER INCLUDED IN THE RIGHT;

3 (D) THE DATE OF PRIORITY OF THE RIGHT;

4 (E) THE PURPOSE FOR WHICH THE WATER INCLUDED IN THE
5 RIGHT IS CURRENTLY USED, IF AT ALL;

6 (F) THE PLACE OF USE AND A DESCRIPTION OF THE LAND, IF
7 ANY, TO WHICH THE RIGHT IS APPURTENANT;

8 (G) THE PLACE AND MEANS OF DIVERSION, IF ANY; AND

9 (H) ANY OTHER INFORMATION NECESSARY TO FULLY DEFINE
10 THE NATURE AND EXTENT OF THE RIGHT, INCLUDING THE TERMS OF
11 ANY COMPACTS NEGOTIATED AND RATIFIED UNDER 85-2-702."

12 Section 5. Section 85-2-702, MCA, is amended to read:

13 "85-2-702. Negotiation with Indian tribes. (1) The
14 reserved water rights compact commission, created by
15 2-15-212, may negotiate with the Indian tribes or their
16 authorized representatives jointly or severally to conclude
17 compacts authorized under 85-2-701. Compact proceedings
18 shall be commenced by the commission. The commission shall
19 serve by certified mail directed to the governing body of
20 each tribe a written request for the initiation of
21 negotiations under this part and a request for the
22 designation of an authorized representative of the tribe to
23 conduct compact negotiations. Upon receipt of such written
24 designation from the governing body of a tribe, compact
25 negotiations shall be considered to have commenced.

(2) When the compact commission and the Indian tribes or their authorized representatives have agreed to a compact, they shall sign a copy and file an original copy with the department of state of the United States of America and copies with the secretary of state of Montana and with the governing body for the tribe involved. The compact is effective and binding upon all parties upon ratification by the legislature of Montana, AND any affected tribal governing body--and--if-legally-necessary, the-congress-of the-United-States or-other-appropriate-federal-authority.

(3) Upon its approval RATIFICATION by the Montana legislature and the tribe or-federal-agency, the terms of a compact must be included in the preliminary decree for informational--purposes as provided by 85-2-231, and unless renegotiated, the terms of the compact must be included in the final decree without-alteration. However, if approval of the state legislature and tribe or-federal-agency has not been accomplished by July 1, 1985 1987, all federal--and Indian claims for reserved water rights that have not been resolved by a compact must be filed with the department within 60-days 6 months. These new filings shall be used in the formulation of the preliminary decree and shall be given treatment similar to that given to all other filings."

SECTION 6. SECTION 85-2-704, MCA, IS AMENDED TO READ:

"85-2-704. Termination of negotiations. (1) The

commission or any other---party---to---the---negotiations negotiating tribe or federal agency may terminate negotiations by providing notice to all parties 30 days in advance of the termination date. On the termination date, the suspension of the application of part 2 provided for in 85-2-217 shall also terminate. The tribe or federal agency shall file all of its claims for reserved rights within 60 days 6 months of the termination of negotiations.

(2) Once negotiations have been terminated pursuant to subsection (1), they may be reopened only by mutual agreement of the parties."

NEW SECTION. SECTION 7. STATUS REPORTS TO CHIEF WATER JUDGE. (1) THE MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION MUST SUBMIT TO THE CHIEF WATER JUDGE, APPOINTED PURSUANT TO 3-7-221, A REPORT ON THE STATUS OF ITS NEGOTIATIONS ON JULY 1, 1985, AND EVERY 6 MONTHS THEREAFTER.

(2) EACH REPORT MUST STATE WHICH INDIAN TRIBES AND FEDERAL AGENCIES ARE ENGAGED IN NEGOTIATIONS, WHETHER ANY NEGOTIATIONS WITH INDIAN TRIBES OR FEDERAL AGENCIES HAVE BEEN TERMINATED, AND THE PROGRESS OF NEGOTIATIONS ON A TRIBE-BY-TRIBE AND AGENCY-BY-AGENCY BASIS. THE REPORT MUST BE MADE AVAILABLE TO THE PUBLIC.

NEW SECTION. Section 8. Effective date. This act is effective on passage and approval.

-End-

153

MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

March 12, 1985

The meeting of the Judiciary Committee was called to order by Chairman Tom Hannah on Tuesday, March 12, 1985 at the hour of 8:30 a.m. in Room 312-3 of the State Capitol.

ROLL CALL: All members were present.

CONSIDERATION OF SENATE BILL NO. 132: Senator Mike Halligan, Senate District #29, sponsor of SB 132, testified. The bill was introduced to allow for first and second degree aggravated assault. The bill simply separates aggravated assault into aggravated assault and felony assault. In some cases where there is a question of serious bodily injury, instead of charging the person with aggravated assault, they are charged with misdemeanor assault which may not be appropriate.

Mark Murphy, assistant attorney general, testified as a proponent to the bill. He said this bill was written by the Cascade County Attorney's office and presented to the Montana County Attorney's Association. He told the committee that there has been a problem over a period of time concerning the definitions of serious bodily injury and bodily injury. Serious bodily injury sets a very high standard and bodily injury sets a very low standard. This bill attempts to find that middle ground and work with it. This bill will allow the jury to have a little bit more flexibility in choosing the lesser included crime -- that is felony assault. He also feels this bill will be successful in covering those areas that they have had great difficulty with.

There being no further proponents or opponents, Senator Halligan closed.

The floor was opened to questioning.

In response to a question asked by Rep. Mercer, Mr. Murphy stated that this bill will still allow that the two-year mandatory penalty provision would be charged if the weapon caused serious bodily injury; however, if the injury is not quite serious bodily injury, that particular crime will be charged as a felony assault rather than the aggravated assault.

Rep. Montayne asked Mr. Murphy how a weapon is defined. Mr. Murphy said that it is still a gray area as to what a weapon is.

In response to a question asked by Rep. Addy, Mr. Murphy said this bill changes the actual penalty provision. It offers an intermediate penalty.

154

CONSIDERATION OF SENATE BILL NO. 28: Senator Dorothy Eck, Senate District #40, sponsor of SB 28, testified in support of this legislation. She informed the committee that SB 28 was introduced at the request of the Select Committee on Indian Affairs. The bill provides for a two year extension of the Reserved Water Rights Compact Commission. She said that Commission has been recently quite successful in negotiating, and there is very little doubt that it is to all of our advantages to extend their work and make sure they continue to be able to negotiate. The bill also clarifies some of the questions and ambiguities in the process of determining reserved water rights. She said the Senate Judiciary worked through the bill and amended it very carefully. All interested parties agree that it is of utmost importance to the state to continue the negotiation process and to settle the matter of determining water rights through the negotiation process rather than through the judicial process. She urged the committee to consider the concept of the bill and to very carefully consider the amendments which were submitted. (See attached Exhibit C and D). She pointed out that there still isn't any agreement on whether due process has to be addressed in this bill.

Senator Joe Mazurek, Senate District #23, stated that he is a member of the Reserve Water Rights Compact Commission, and this was a very sensitive issue which was considered in the Senate Judiciary Committee. He stated that the bill is very important. He also said that the Senate Judiciary Committee made a technical mistake which relates to the whole area around the amendments that were made. The existing statute is not entirely clear as there is a lot of room for interpretation as to what happens to a negotiated contract, whether or not a water user can come and object to that compact. And, if he can come in and object to the compact, on what basis he or she objects to it. What we are trying to do here is save the time and expense of litigating what the reserved water rights are.

There has to be due process afforded to all the members who participate in this adjudication. These amendments would provide a very limited basis upon which a non-Indian or non-federal water user could object to any compact. The only thing they could object to is essentially those things that are shown in subparagraph 5 on the bottom of those amendments -- they could only object to the authority of the state to determine Indian or other federal reserve water rights or the authority of the state to enter into a binding contract with a tribe or the process by which the compact was negotiated. The idea is that we want to at least give someone the opportunity to come forward so that the whole process cannot be thrown out because they have not had the opportunity to object to the right of the state to enter into this negotiation process. Senator Mazurek feels

155

that the tribes won't have any problems with the amendments proposed. He suggested that the amendments be sent to the tribes so they may state their opinion. He said that if there are objections, he feels the most appropriate thing to do is to restore the law to the state it was in before this session began.

Louis Clayborn, coordinator of Indian Affairs for the state of Montana, testified. He feels that it is very important that the tribes be given the opportunity to review the proposed amendments.

K.M. Kelly, representing the Montana Water Development Association and the Montana Irrigators, Inc., testified in support of SB 28. A copy of his written testimony was marked Exhibit E and attached hereto.

Jo Brunner, representing the Women Involved in Farm Economics, wished to go on record as supporting the extension of the Compact Commission.

Clay Smith, assistant attorney general, stated that he supports the bill as reported out of the Senate with the exception of those matters that Senator Mazurek addressed today in his remarks. Those deal with what essentially happens to negotiated compacts after it has been ratified by the respective governing bodies of the tribes and the governing body of this state being the legislature. He feels the amendments submitted this morning address the concern the of the Attorney General's Office has with respect to the bill as reported from the Senate. He believes the amendments should be adopted if the committee is not going to revert back to the language of present statute with respect to what happens to a contract after it has been negotiated and ratified by the legislature. He believes the amendments also address their due process concern. With the amendments, he fully supports the bill.

Marcia Beebe Rundle, attorney for the Montana Reserved Water Rights Compact Commission, urged the committee to adopt SB 28 with the inclusion of the amendments offered by Senator Eck. A copy of her written testimony was marked Exhibit F and attached hereto. She suggested some technical changes to the proposed amendments.

There being no further proponents or opponents, Senator Eck closed. She gave a brief summary of what the proposed amendments are supposed to do. It allows in court what matters may be questioned. The first question is whether the state has the authority to enter into a compact. The second one, does the state have the authority to enter into a binding compact where the decisions that are made in the compact are apt to be binding. The third question is whether the process has been prompt. She informed the committee that Reed Chambers, the attorney for the Fort Peck Reservation, has discussed the amendments with Senator Mazurek. Mr. Chambers feels these amendments will be acceptable.

15

The floor was opened for questions.

In response to a question asked by Rep. O'Hara, Senator Eck said that the first set of amendments (labelled I) was prepared by Clay Smith of the Attorney General's Office and the second set of amendments (labelled II) is a variation and refinement of the first set of amendments.

Rep. Eudaily wanted to know if this is all general fund money. Senator Eck said as far as she knows, that it is general fund money. Rep. Eudaily further asked her if there was any federal matching money involved. Senator Eck stated that she doesn't believe there is any federal fund money involved.

Rep. Grady asked how much longer this commission will have to continue and will it have to go on until this entire communication is over? Senator Eck said that they would really like to see it finished within the next two-year period. However, she doesn't know if it will be finished in that period of time and they may have to ask for an extension.

There being no further questions, hearing closed on SB 28.

Chairman Hannah informed the committee that a letter with attached amendments will go out to the interested parties to request their opinions and input. He will request the parties to submit a response by the 20th of March. The committee will try to act on this bill by the 22nd of March.

EXECUTIVE SESSION:

An executive session was called at 10:55 to act on some of the bills in committee.

ACTION ON SENATE BILL NO. 132: Rep. Hammond moved that SB 132 BE CONCURRED IN. The motion was seconded by Rep. Eudaily and discussed.

Rep. Hannah spoke in favor of the bill by saying he believes there is a hole in the present laws as to what charges can be brought against a person. He feels this bill will remedy some of the present problems they have in this area.

Rep. Mercer pointed out that this bill takes out the mandatory minimum sentence which creates a hole in the areas of the law.

Rep. Addy said this bill gives the jury a third option of being able to convict a person with a second more serious offense. He said the bill is just trying to get some flexibility back into the system that the minimum mandatory sentence took out.

The question was called, and the motion carried on a voice vote with Rep. Gould dissenting. Rep. Addy agreed to carry the bill on the floor.

157

DAILY ROLL CALL

HOUSE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 3/12/85

NAME	PRESENT	ABSENT	EXCUSED
Tom Hannah (Chairman)	✓		
Dave Brown (Vice Chairman)	✓		
Kelly Addy	✓		
Toni Bergene	✓		
John Cobb	✓		
Paula Darko	✓		
Ralph Eudaily	✓		
Budd Gould	✓		
Edward Grady	✓		
Joe Hammond	✓		
Kerry Keyser	✓		
Kurt Krueger	✓		
John Mercer	✓		
Joan Miles	✓		
John Montayne	✓		
Jesse O'Hara	✓		
Bing Poff	✓		
Paul Rapp-Svrcek	✓		

Amendments to Senate Bill 28

1. Title, line 8.

Following: "NECESSARY;"

Insert: "LIMITING THE OBJECTIONS THAT MAY BE MADE TO A COMPACT
IN THE WATER COURTS;"

2. Title, line 12.

Following: "INCLUDED"

Strike: " ; "

3. Title, line 13.

Following: "DECREE"

Insert: " ; "

4. Page 6, following line 1.

Insert: "Section 4. Section 85-2-233, MCA, is amended to read:

"85-2-233. Hearing on preliminary decree. (1) Upon objection to the preliminary decree by the department, a person named in the preliminary decree, or any other person, for good cause shown, the department or such person is entitled to a hearing thereon before the water judge.

(2) If a hearing is requested, such request must be filed with the water judge within 90 days after notice of entry of the preliminary decree. The water judge may, for good cause shown, extend this time limit an additional 90 days if application for the extension is made within 90 days after notice of entry of the preliminary decree.

(3) The request for a hearing shall contain a precise statement of the findings and conclusions in the preliminary decree with which the department or person requesting the hearing disagrees. The request shall specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request shall state the specific grounds and evidence on which the objections are based.

(4) Upon expiration of the time for filing objections and upon timely receipt of a request for a hearing, the water judge shall notify each party named in the preliminary decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing shall be conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e).

(5) Objections to a compact negotiated and ratified under 85-2-702 or 85-2-703 shall be limited to:

(a) the authority of the state:

(i) to determine Indian or other federally reserved water rights through the procedure set forth in 85-2-702 and 85-2-703; and

(ii) to bind through such determination, for purposes of a final decree under 85-2-234, all persons whose existing rights are or may be affected by the compact; or

(b) the process by which the compact was negotiated or ratified.

(6) Failure to object under subsection (2) to a compact bars any subsequent cause of action based in whole or in part on those grounds for objection stated above.

(7) If the court sustains an objection under section (5) above, it shall declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the tribe party to the compact shall be permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall thereafter issue a new preliminary decree in accord with 85-2-231; provided, however, that any party to a compact declared void may appeal from such determination in accord with those procedures applicable to 85-2-235, and the filing of a notice of appeal shall stay the period for filing a statement of claim as required hereunder."

Renumber: subsequent sections

5. Page 6, line 10.

Following: "of"

Strike: "a"

Insert: "any"

Following: "compact"

Strike: "negotiated" through "85-2-702" on line 11

Insert: "to which no objection was sustained under 85-2-233"

6. Page 6, line 11.

Following: "decree"

Insert: "without alteration"

7. Page 8, line 10.

Following: "RIGHT"

Strike: "INCLUDING" through "85-2-702"

8. Page 9, line 4.

Following: "85-2-231"

Strike: ", and" through "decree" on line 16

AMEN/hm/SB 28a Brenda

142

Amendments to Senate Bill 28

1. Title, line 8.

Following: "NECESSARY;"

Insert: "LIMITING THE OBJECTIONS THAT MAY BE MADE TO A COMPACT
IN THE WATER COURTS;"

2. Title, line 12.

Following: "INCLUDED"

Strike: " ; "

3. Title, line 13.

Following: "DECREE"

Insert: " ; "

4. Page 6, following line 1.

Insert: "Section 4. Section 85-2-233, MCA, is amended to read:

"85-2-233. Hearing on preliminary decree. (1) Upon objection to the preliminary decree by the department, a person named in the preliminary decree, or any other person, for good cause shown, the department or such person is entitled to a hearing thereon before the water judge.

(2) If a hearing is requested, such request must be filed with the water judge within 90 days after notice of entry of the preliminary decree. The water judge may, for good cause shown, extend this time limit an additional 90 days if application for the extension is made within 90 days after notice of entry of the preliminary decree.

(3) The request for a hearing shall contain a precise statement of the findings and conclusions in the preliminary decree with which the department or person requesting the hearing disagrees. The request shall specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request shall state the specific grounds and evidence on which the objections are based.

(4) Upon expiration of the time for filing objections and upon timely receipt of a request for a hearing, the water judge shall notify each party named in the preliminary decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing shall be conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e).

(5) Objections to a compact negotiated and ratified under 85-2-702 or 85-2-703 shall be limited to:

(a) the authority of the state:

(i) to determine Indian or other federally reserved water rights through the procedure set forth in 85-2-702 and 85-2-703; and

(ii) to bind through such determination, for purposes of a final decree under 85-2-234, all persons whose existing rights are or may be affected by the compact; or

(b) the process by which the compact was negotiated or ratified.

(6) Failure to object under subsection (2) to a compact bars any subsequent cause of action based in whole or in part on those grounds for objection stated above.

(7) If the court sustains an objection under section (5) above, it shall declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the tribe party to the compact shall be permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall thereafter issue a new preliminary decree in accord with 85-2-231; provided, however, that any party to a compact declared void may appeal from such determination in accord with those procedures applicable to 85-2-235, and the filing of a notice of appeal shall stay the period for filing a statement of claim as required hereunder."

Renumber: subsequent sections

5. Page 6, line 10.

Following: "of"

Strike: "a"

Insert: "any"

Following: "compact"

Strike: "negotiated" through "85-2-702" on line 11

Insert: "to which no objection was sustained under 85-2-233"

6. Page 6, line 11.

Following: "decree"

Insert: "without alteration"

7. Page 8, line 11.

Following: "85-2-702"

Insert: "to which no objection was sustained under 85-2-233"

8. Page 9, line 14.

Following: "and"

Insert: "unless an objection to the compact is sustained under 85-2-233,"

9. Page 9, line 16.

Following: "decree"

Insert: "without alteration"

AMEN/hm/SB 28 Brenda

162

WITNESS STATEMENT

NAME K.M. Kelly BILL NO. 28
ADDRESS Helena DATE 3/12/85
WHOM DO YOU REPRESENT? MT. WATER DEVELOP. ASSN
MT. IRRIGATORS INC
SUPPORT Support OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: The Montana Water Development Assn. and the Montana
Irrigators support SB 28 Extending the Water Right Compact
Commission.

We think the Commission has performed well and
that much can be accomplished by allowing them
more time for negotiations with the tribes.



Ted Schwinden
Governor

State of Montana

EXHIBIT F
3/12/85
SB 26

Reserved Water Rights Compact Commission

Jack E. Galt, Vice Chairman
William M. Day
Everett C. Elliott
Larry Fasbender

W. Gordon McOmber, Chairman

Daniel Kemmis
A. B. Linford
Joseph P. Mazurek
Audrey G. Roth

Urban L. Roth, Special Counsel

March 12, 1985

House Judiciary Committee
Montana State Capitol
Helena, Montana 59620

Dear Committee Members:

The Montana Reserved Water Rights Compact Commission and the negotiations process were created by Senate Bill 76 as an alternative to litigation of federal reserved rights in the state water court. This compromise was perceived to be in the best interests of the state, the federal agencies, and the Indian Tribes of Montana. The Compact Commission is concerned about the potential effect of amendments to the negotiations process. In our opinion, opening the compacts to objection in the water court as to the substantive provisions agreed upon in negotiations between the parties would substantially diminish the value of the process as an alternative to litigation. We opposed amending the statute in that manner in the Senate Judiciary Committee.

The Compact Commission supports the amendment which Senator Eck has submitted for your consideration. In the opinion of the Compact Commission, this new amendment explicitly recognizes those issues which could appropriately be raised by state water right holders in the water court during hearings on preliminary decrees.

In the context of interstate compacts, the United States Supreme Court has affirmed that sovereigns can bind their citizens to the terms of compacts apportioning water. In our opinion, the same principle applies to compacts negotiated between the State and the federal agencies, or between the State and the Indian Tribes of the State. It is appropriate, however, that a water user be able to challenge the compact on that basis and receive a judicial determination of the issue. It is also appropriate that the compact be open to challenge as to whether the statutory processes for negotiation and ratification were followed.

With the exception of these grounds for objection, the Compact Commission believes that the compacts are immune from challenge in the state water court adjudication process. Citizens will, of course,

D. Scott Brown, Program Manager
Marcia Beebe Rundle, Legal Counsel

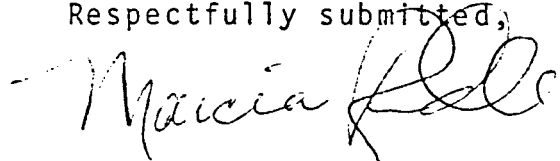
32 South Ewing
Helena, Montana 59620
(406) 444-6601

164

have opportunities for input to the Compact Commission, and will be provided notice and opportunities for comments during the process of legislative ratification.

We urge adoption of Senate Bill 28 as passed by the Senate, and the inclusion of the amendments offered by Senator Eck today. Thank you for the opportunity to testify to your committee.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Marcia Beebe Rundle".

Marcia Beebe Rundle
Attorney
Montana Reserved Water
Rights Compact Commission

MBR/mfs

VISITORS' REGISTER

HOUSE JUDICIARY

COMMITTEE

SB 28 (Sen. Eck)

SENATE BILL NO. SB 54 (Sen. Towe)

DATE March 12, 1985

SPONSOR SB 89 (Sen. Mazurek)

SB 132 (Sen. Halligan)

NAME (please print)	RESIDENCE REPRESENTING	SUPPORT	OPPOSE
REGINA M. DOLLETON	AARP	✓	
Dennis Stober	State Revenue	✓	
Don Seaton	GRS	40 54 ✓	
K.M. Kelly	Mt. Water Develop. Assoc. SB 28	✓	
Jack Galt	Mt. Irrigators, Inc. SB 28	✓	
Ch. Brunner	WIFE	28 ✓	
Mark J. Murphy	R.G.'s office	28 ✓	
Roberta Muttend	Lease Legislation	54 ✓	
Doug Blakely	Q. Budman	54 ✓	
Joe Upshaw	AARP / Lease Legislation	54 ✓	
DL Clayborn	Indian Affairs	28	
Marcia Beebe Ruddle	Reserved Water Rights	28	
G. Kline	Compact Commission		
EDWARD AZURE	INDIAN AFFAIRS		
Lynn Foster	FT. BELKNAP INDIAN	28	
Diana Copeland	COMMUNITY STAFF		
Tom Ryan	MT. Oregon	54	
	myself		
	MSOA	53 54 +	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

March 22, 1985

The meeting of the Judiciary Committee was called to order by Chairman Tom Hannah on Friday, March 22, 1985 at 8:00 a.m. in Room 312-3 of the State Capitol.

ROLL CALL: All members were present.

CONSIDERATION OF SENATE BILL NO. 152: Sen. Bob Brown, Senate District #2, sponsor of SB 152, testified and said the main intent of the bill is to change the presumption of the law to favor joint custody. The judge has to presume joint custody in divorce cases unless the judge finds, under the factors set forth in 40-4-212, that joint custody is not in the best interests of the minor child. Senator Brown pointed out that the reason that fathers are oftentimes delinquent in their child support payments is because in so many cases they are not awarded visitation rights. He said in the cases where there is joint custody, child support payments are paid much more often. In closing, Senator Brown said he felt the world would be a better place for both children and parents if this legislation were to pass.

PROPOSERS:

Doug Grob, a member of the Governor's Child Support Advisory Council, testified as a proponent. During most of his testimony, Mr. Grob referred to a document entitled "A Presumption of Joint Custody, Constitutionally Guaranteed." A copy of that particular document, inclusive of his specific references, was marked Exhibit A and attached hereto. He said that it is important to recognize the distinction between joint physical and joint legal custody. If a father thinks he is going to get joint legal custody he still has to do battle in order to obtain access to the child. So, to make joint legal or joint physical at the judge's discretion, you set up a double road block because the joint legal will provide the compromise to the judge between the sole custody and joint custody when, indeed, it really is not. The positive aspects of the child do not occur unless there is at least a 30%, and close to 50%, relationship of that child spending physical time with both parents. He further pointed out that the default on child support in the nation is 72% in sole custody cases. That figure dropped to 6% and 7% in joint custody cases as well as the amount of money paid being 30% higher today in joint custody than in sole custody. He said that consistently across the nation, the major amount of opposition to presumptive joint custody has come from Legal Aide. Legal Aide's caseload is 60-75% nationwide custody and divorce - 99.8% of that custody and divorce is representing women in custody and divorce.

167

called on the motion to amend, and it carried on a voice vote.

Rep. Hammond moved that SB 152 BE CONCURRED IN AS AMENDED. The motion was seconded by Rep. Keyser and further discussed.

Rep. Krueger said that by passing this bill we are basically changing the standards. Right now, we do have the "best interest" standard. We are trying to change the standard by saying that there is a presumption of joint custody. He feels the court should be able to look at the best interests of the child. He feels this is the standard that we should continue to maintain. Rep. Addy feels that in this particular field, as long as you don't state a presumption of joint custody, those stereotypes will be acting on the players of the game. He feels that by stating joint custody as a presumption you have made the process neutral. Rep. Krueger's last comment was that he feels that the hostility factor can clearly not make this a workable bill.

The question was called, and the motion carried with Rep. Krueger dissenting.

ACTION ON SENATE BILL NO. 28: It was Rep. Hannah's feeling that the committee should adopt the amendments as proposed by Senator Mazurek. A copy of those amendments are attached and marked Exhibit D. Rep. Darko moved that SB 28 BE CONCURRED IN. The motion was seconded by Rep. Hammond. It was brought out that these particular amendments are acceptable to those particular tribes to which they were sent for review. Correspondence relative to this bill was marked as a package (Exhibit E) and attached hereto.

Rep. Hammond moved that the committee adopt the proposed amendments. The motion was seconded by Rep. O'Hara and carried on a voice vote. Rep. O'Hara further moved that SB 28 BE CONCURRED IN AS AMENDED. The motion was seconded by Rep. Miles. The question was called, and the motion carried with Rep. Keyser dissenting. Rep. Hannah will carry the bill on the floor.

ACTION ON SENATE BILL NO. 392: Rep. Hammond moved that HB 392 BE NOT CONCURRED IN. The motion was seconded by Rep. Darko. Rep. Keyser moved a substitute motion that SB 392 BE CONCURRED IN. The motion was seconded by Rep. O'Hara. Rep. Rapp-Svrcek moved to amend page 1, line 13 following "prison" by striking "has been determined to be a persistent felony offender". The motion was seconded by Rep. Hammond, and it failed due to a tie vote. (See roll call vote.)

Rep. Addy moved to amend page 1, line 18 following "homicide," by striking "mitigated" through "assault,". The motion was seconded by Rep. Miles and discussed. He said this amendment would limit the number of offenses whereby a person could be sentenced to death. He further said that he has a problem with

168

STANDING COMMITTEE REPORT

HOUSE

March 22 19 85

page 1 of 3

MR. Speaker:

We, your committee on Judiciary

having had under consideration Senate Bill No. 28

Third reading copy (Blue)
color

EXTENDING RES. WATER RIGHTS COMPACT COMMISSION & CHANGES IN
WATER ADJUDICATION

Respectfully report as follows: That Senate Bill No. 28
be amended as follows:

1. Title, line 8.
Following: "NECESSARY;"
Insert: "LIMITING THE OBJECTIONS THAT MAY BE MADE TO A COMPACT
IN THE WATER COURTS;"

2. Title, line 12.
Following: "INCLUDED"
Strike: ";"

3. Title, line 13.
Following: "DECREE"
Insert: ";"

XEROX

En 7/2-

(continued)

Chairman.

March 22 19.85

page 2 of 3
SB 28

4. Title, line 17.
Following: "85-2-231,"
Insert: "85-2-233,"

5. Page 6, following line 1.
Insert: "Section 4. Section 85-2-233, MCA, is amended to read:
"85-2-233. Hearing on preliminary decree. (1) Upon
objection to the preliminary decree by the department, a
person named in the preliminary decree, or any other person,
for good cause shown, the department or such person is
entitled to a hearing thereon before the water judge.
(2) If a hearing is requested, such request must be
filed with the water judge within 90 days after notice of
entry of the preliminary decree. The water judge may, for
good cause shown, extend this time limit an additional 90
days if application for the extension is made within 90 days
after notice of entry of the preliminary decree.
(3) The request for a hearing shall contain a precise
statement of the findings and conclusions in the preliminary
decree with which the department or person requesting the
hearing disagrees. The request shall specify the paragraphs
and pages containing the findings and conclusions to which
objection is made. The request shall state the specific
grounds and evidence on which the objections are based.
(4) Upon expiration of the time for filing objections
and upon timely receipt of a request for a hearing, the
water judge shall notify each party named in the preliminary
decree that a hearing has been requested. The water judge
shall fix a day when all parties who wish to participate in
future proceedings must appear or file a statement. The
water judge shall then set a date for a hearing. The water
judge may conduct individual or consolidated hearings. A
hearing shall be conducted as for other civil actions. At
the order of the water judge a hearing may be conducted by
the water master, who shall prepare a report of the hearing
as provided in M.R.Civ.P., Rule 53(e).
(5) Objections to a compact negotiated and ratified
under 85-2-702 or 85-2-703 shall be limited to:
(a) the authority of the state;
(i) to determine Indian or other federally reserved
water rights through the procedure set forth in 85-2-702 and
85-2-703; and
(ii) to bind through such determination, for purposes
of a final decree under 85-2-234, all persons whose existing
rights are or may be affected by the compact; or
(b) the process by which the compact was negotiated or
ratified.

(continued)

Chairman.

March 22

19 85

page 3 of 3

SB 28

(6) Failure to object under subsection (2) to a compact bars any subsequent cause of action based in whole or in part on those grounds for objection stated in subsection (5).

(7) If the court sustains an objection under subsection (5), it shall declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the tribe party to the compact shall be permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall thereafter issue a new preliminary decree in accordance with 85-2-231; provided, however, that any party to a compact declared void may appeal from such determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal shall stay the period for filing a statement of claim as required under this subsection."

Renumber: subsequent sections

6. Page 6, line 11.

Following: "decree"

Insert: "without alteration unless an objection is sustained pursuant to 85-2-233"

7. Page 9, line 14.

Following: "and"

Insert: "unless an objection to the compact is sustained under 85-2-233,"

8. Page 9, line 16.

Following: "decree"

Insert: "without alteration"

AND AS AMENDED,
BE CONCURRED IN

Tom Hannah

TOM HANNAH,

Chairman.

KMC
in 3/22

DAILY ROLL CALL

HOUSE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 3/22/85

NAME	PRESENT	ABSENT	EXCUSE
Tom Hannah (Chairman)	✓		
Dave Brown (Vice Chairman)	✓		
Kelly Addy	✓		
Toni Bergene	✓		
John Cobb	✓		
Paula Darko	✓		
Ralph Eudaily	✓		
Budd Gould	✓		
Edward Grady	✓		
Joe Hammond	✓		
Kerry Kevser	✓		
Kurt Krueger	✓		
John Mercer	✓		
Joan Miles	✓		
John Montayne	✓		
Jesse O'Hara	✓		
Bing Poff	✓		
Paul Rapp-Svrcek	✓		

Proposed amendments to Senate Bill 28

1. Title, line 8.

Following: "NECESSARY;"

Insert: "LIMITING THE OBJECTIONS THAT MAY BE MADE TO A COMPACT
IN THE WATER COURTS;"

2. Title, line 12.

Following: "INCLUDED"

Strike: ";

3. Title, line 13.

Following: "DECREE"

Insert: ";

4. Title, line 17.

Following: "85-2-231,"

Insert: "85-2-233,"

5. Page 6, following line 1.

Insert: "Section 4. Section 85-2-233, MCA, is amended to read:

"85-2-233. Hearing on preliminary decree. (1) Upon objection to the preliminary decree by the department, a person named in the preliminary decree, or any other person, for good cause shown, the department or such person is entitled to a hearing thereon before the water judge.

(2) If a hearing is requested, such request must be filed with the water judge within 90 days after notice of entry of the preliminary decree. The water judge may, for good cause shown, extend this time limit an additional 90 days if application for the extension is made within 90 days after notice of entry of the preliminary decree.

(3) The request for a hearing shall contain a precise statement of the findings and conclusions in the preliminary decree with which the department or person requesting the hearing disagrees. The request shall specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request shall state the specific grounds and evidence on which the objections are based.

(4) Upon expiration of the time for filing objections and upon timely receipt of a request for a hearing, the water judge shall notify each party named in the preliminary decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing shall be conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e).

(5) Objections to a compact negotiated and ratified under 85-2-702 or 85-2-703 shall be limited to:

(a) the authority of the state:
(i) to determine Indian or other federally reserved water rights through the procedure set forth in 85-2-702 and 85-2-703; and
(ii) to bind through such determination, for purposes of a final decree under 85-2-234, all persons whose existing rights are or may be affected by the compact; or
(b) the process by which the compact was negotiated or ratified.
(6) Failure to object under subsection (2) to a compact bars any subsequent cause of action based in whole or in part on those grounds for objection stated in subsection (5).
(7) If the court sustains an objection under subsection (5), it shall declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the tribe party to the compact shall be permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall thereafter issue a new preliminary decree in accordance with 85-2-231; provided, however, that any party to a compact declared void may appeal from such determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal shall stay the period for filing a statement of claim as required under this subsection."

Renumber: subsequent sections

6. Page 6, line 10.

Following: "of"

Strike: "a"

Insert: "any"

Following: "compact"

Strike: "negotiated" through "85-2-702" on line 11

Insert: "to which no objection was sustained under 85-2-233"

7. Page 6, line 11.

Following: "decree"

Insert: "without alteration"

8. Page 8, line 10.

Following: "RIGHT"

Strike: "INCLUDING" through "85-2-702"

9. Page 9, line 4.

Following: "85-2-231"

Strike: ", and" through "decree" on line 16

RECOMMENDED STAFF CHANGES

For above amendments numbered 6 through 9, substitute the following:

6A. Page 6, line 11.

Following: "decree"

Insert: "without alteration unless an objection is sustained pursuant to 85-2-233"

7A. Page 9, line 14.

Following: "and"

Insert: "unless an objection to the compact is sustained under 85-2-233,"

8A. Page 9, line 16.

Following: "decree"

Insert: "without alteration"

3/22/85

SB 28

THE BLACKFEET TRIBE

OF THE BLACKFEET INDIAN NATION

P. O. Box 850

BROWNING, MONTANA 59417

TRIBAL COUNCIL

EXECUTIVE COMMITTEE

EARL OLD PERSON, CHAIRMAN
JOHN "BUSTER" YELLOW KIDNEY, VICE-CHAIRMAN
MYRNA J. GALBREATH, SECRETARY
ELOUISE C. COBELL, TREASURER

EARL OLD PER
JOHN "BUSTER" YELLOW KID
MYRNA J. GALBRE
ROLAND F. KENNE
JOE J. MC
ARTHUR WE
LEONARD J. MOUNTAIN CH
CARL KIPP
TOM TAIL FEATH

March 19, 1985

Representative Tom Hannah
Chairman, House Judiciary Committee
Montana House of Representatives
Capitol Station
Helena, Montana 59602

Dear Mr. Hannah:

The purpose of this letter is to briefly comment upon the proposed amendments to Senate Bill 28, which is now pending before your Committee. Let me also take this opportunity to thank you in allowing me an opportunity to comment on this important legislation.

As I understand the Attorney General's proposed amendment, private citizens of the State would be allowed an opportunity to challenge any compact negotiated pursuant to Section 85-2-702 or 85-2-703 of the Montana Water Use Act between the State and either the individual Indian Tribes or the Federal Government. It is further my understanding that citizen challenges would be limited to: 1) challenging the authority of the State to determine Indian or federally reserved water rights through negotiations; and 2) challenging State authority to bind through negotiation, individual citizens whose existing rights are or may be affected by a negotiated compact; and 3) challenging the process of compact negotiation or ratification. Failure to raise objection in a timely manner would bar any later objection on those same grounds. In the event a compact is declared void, affected parties (tribal or federal) have six (6) months to file a statement of claim, provided however, that any party to a compact declared to be void, has a right to appeal with any filing duty stayed pending the appeal outcome. Finally, it is my understanding that the amendment is intended to remedy a perceived due process problem.

I must first take the position that there exists no due process problem in connection with negotiated compacts. Supposedly, because individual state citizens are not part of the negotiations or compact, and their existing rights may be affected, they are being denied property without due process of law. I believe this theory to be incorrect for several reasons.

Representative Tom Hannah
March 19, 1985
Page Two

First, the Compact Commission, through the existing law and delegation of authority, does have the authority to bind the State and its citizens in a negotiated compact. This is what occurred in Yellowstone River Compact where the State legislature delegated the authority to the Yellowstone River Compact Commission to bind State citizens in that instance. The present situation with the general stream adjudication exists here, and in this instance there is a more compelling need to insure that the Reserved Water Rights Compact Commission has such authority. Only then can they be bargained with in sincere good faith.

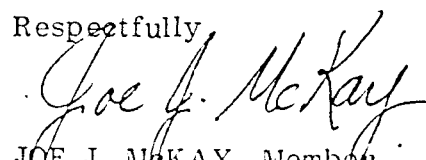
Secondly, through the adoption of the Montana Constitution, the people of the State charged the legislature with settling water rights in Montana through a comprehensive general stream adjudication. Knowing the potential jurisdictional problems plaguing Indian water rights, surely negotiations was an anticipated avenue for settling such rights. By their expression in the 1972 Constitution the people of this State gave to the legislature the authority to bind them in settling Montana's water rights. In enacting the various provisions of the Montana Water Use Act, this legislature has already acknowledged its authority and responsibility with regard to State water rights. That authority should not be undermined at this stage of the game in an effort to quiet non-existent legal fears.

Another reason that there should be no amendment to the present recognition of the State's authority to bind its citizens in this matter, is that allowing such challenges would only make for increase of litigation and litigation costs which seem to escalate exponentially. Allowing challenges based upon State authority to bind its citizens only paves the way for lawyers to present various kinds of challenges intended only to delay or hinder the negotiation proceedings. The potential of undermining the authority of the Compact Commission through this kind of activity, thereby casting doubt on the entire negotiation process should not be tolerated. Included in this process is cost of litigation. Remember that avoiding the higher litigation expense is one of the primary factors favoring negotiated settlements. If these costs are to be a reality from the outset, that is before negotiation, the weight may shift from negotiating in an aborted attempt to avoid litigation costs, to an assumption that the costs are inevitable and should therefore be incurred knowingly in all out litigation.

Finally, if the Committee continues to believe a due process problem exists, then the present amendments are at least more acceptable than similar amendments offered in the Senate Judiciary Committee. As final fallback position, we would not object to the proposed amendments. I must say, however, that I sometimes wonder exactly what role the State Attorney General is supposed to play or has played in the Indian reserved rights issue. At best the role seems suspicious, at worst one of down right subversion. Perhaps it is time his role was clarified in terms everyone understands.

Once again thank you for this opportunity to present my views. Thank you.

Respectfully



JOE J. MCKAY, Member
Blackfeet Tribal Business Council

126

Fredericks & Pelcyger

ATTORNEYS AT LAW
CANYON CENTER
1881 9TH STREET, SUITE 216
BOULDER, COLORADO 80302

(303) 443-1683

THOMAS R. ACEVEDO*
THOMAS W. FREDERICKS
ROBERT S. PELCYGER**
ROBERT S. THOMPSON, III***
DALE T. WHITE

TOM W. ECHOHAWK
(1952 - 1982)

OF COUNSEL
ROBERT J. GOLTEN

*ADMITTED ONLY IN VIRGINIA
**ADMITTED ONLY IN CALIFORNIA AND NEW YORK
***ADMITTED ONLY IN WISCONSIN

March 19, 1985

Marcia Rundle
Legal Counsel
Reserved Waters Rights
Compact Commission
32 South Ewing
Helena, Montana 59620

Re: Senate Bill 28 --
Montana Compact Commission

Dear Ms. Rundle:

As per your letter of March 13, 1985, to Donald Stewart, Sr., I am forwarding our comments on behalf of the Crow Tribe concerning Senate Bill 28. In general, the Tribe supports enactment of the Senate Bill and extension of the compact commissions for an additional two year period.

Our only comments and suggested amendments center upon the new section of the bill which provides for the filing of objections to a compact. As you can see by the attached sheet, we would add a new subsection (6) to the bill which would insure that any potential claim based upon a taking of private property would not affect the validity of the negotiated compact.

With the exception of this amendment, we have no objection to enactment of Senate Bill 28.

Sincerely yours,

Dale T. White

Dale T. White

DTW/df

cc: Donald Stewart, Sr.
Representative Hannah

17X

(5) Objections to a compact negotiated and ratified under 85-2-702 or 85-2-703 shall be limited to:

(a) the authority of the state:

(b) to determine Indian or other federally reserved water rights through the procedure set forth in 85-2-702 and 85-2-703; and

(ii) to bind through such determination, for purposes of a final decree under 85-2-234, all persons whose existing rights are or may be affected by the compact; or

(b) the process by which the compact was negotiated or ratified.

(6) The exclusive remedy of a party who files objections to a compact negotiated and ratified under 85-2-702 or 85-2-703 based on the grounds of infringement or taking of private property shall be a claim for compensation and shall not affect the validity of the compact,

8. Failure to object under subsection (2) to a compact bars any subsequent cause of action based in whole or in part on those grounds for objection stated in subsection (5).

9. If the court sustains an objection, under subsection (5), it shall declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the tribe party to the compact shall be permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall thereafter issue a new preliminary decree in accordance with 85-2-231; provided, however, that any party to a compact declared void may appeal from such determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal shall stay the period for filing a statement of claim as required under this subsection."



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

BILLINGS AREA OFFICE

316 NORTH 26TH ST.

BILLINGS, MONTANA 59101

IN REPLY REFER TO:

Water Resources
Code 380

MAR 21 1985

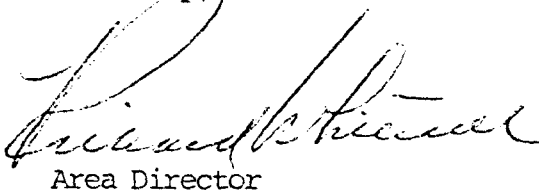
Representative Tom Hannah
Chairman, House Judiciary Committee
Capitol Station
Helena, Montana 59620

Dear Mr. Hannah:

The Department of Interior comments on Senate Bill No. 28 made during the Senate hearings on the bill are still valid. We will not submit a statement to the House Judiciary Committee, which would just be a duplication of our comments to the Senate. The Department still strongly urges an extension of the deadline.

Thank you for the opportunity to comment on Senate Bill No. 28.

Sincerely,



Area Director

174

State of Montana
Office of the Governor
Helena, Montana 59620

TED SCHWINDEN
GOVERNOR

March 18, 1985

The Honorable Tom Hannah, Chairman
House Judiciary Committee
House of Representatives
State Capitol
Helena, MT 59620

Dear Representative Hannah:

We have reviewed the amendments to Senate Bill 28 drafted by members of the Compact Commission and Attorney General's Office. We find the amendments acceptable and urge the passage of Senate Bill No. 28 as amended.

Thank you for inviting our comments.

Sincerely,


MONA JAMISON
Chief Legal Counsel

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION



TED SCHWINDEN, GOVERNOR

32 SOUTH EW

STATE OF MONTANA

(406) 444-6699

HELENA, MONTANA 59

March 19, 1985

Representative Tom Hannah
Chairman House Judiciary Committee
Capitol Station
Helena, Montana 59620

Dear Representative Hannah:

I am writing to you in response to your March 12, 1985 letter concerning amendments to Senate Bill 28.

The proposed amendments have been reviewed by the legal staff of the Department of Natural Resources and Conservation and it is the agency position that the amendments accord due process in compliance with both state and federal constitutions. Therefore, the Department has no objection to the amendments as proposed.

It should be noted that Amendment No. 9 should read "Page 9, line 14." rather than "Page 9, line 4."

Thank you for the opportunity to respond to the proposed amendments and I trust this information will be of value to you and to the Judiciary Committee.

Sincerely,

Larry Fاسبندر

LARRY FASBENDER
DIRECTOR

1 SENATE BILL NO. 28

2 INTRODUCED BY ECK

3 BY REQUEST OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

4
5 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A 2-YEAR
6 EXTENSION OF THE EXISTENCE OF THE RESERVED WATER RIGHTS
7 COMPACT COMMISSION; PROVIDING FOR FEDERAL APPROVAL OF A
8 COMPACT ONLY IF LEGALLY NECESSARY; LIMITING THE OBJECTIONS
9 THAT MAY BE MADE TO A COMPACT IN THE WATER COURTS; REQUIRING
10 THAT-THE-TERMS-OF-A-COMPACT--SET--FORTH--IN--A--PRELIMINARY
11 DECREE---BE--REPRODUCED--UNCHANGED PROVIDING AN ALTERNATE
12 STATEMENT OF CLAIM FOR RESERVED RIGHTS NOT YET PUT TO USE;
13 SPECIFYING THE INFORMATION RELATING TO RESERVED RIGHTS TO BE
14 INCLUDED; IN THE FINAL DECREE; EXTENDING FROM 60 DAYS TO 6
15 MONTHS THE TIME PERIOD FOR FILING IN THE WATER COURT CLAIMS
16 UNRESOLVED BY THE COMPACT COMMISSION; REQUIRING THE
17 COMMISSION TO MAKE STATUS REPORTS TO THE WATER JUDGE;
18 AMENDING SECTIONS 85-2-217, 85-2-224, 85-2-231, 85-2-233,
19 85-2-234, AND 85-2-702, AND 85-2-704, MCA; AND PROVIDING AN
20 IMMEDIATE EFFECTIVE DATE."

21
22 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

23 Section 1. Section 85-2-217, MCA, is amended to read:

24 "85-2-217. Suspension of adjudication. While
25 negotiations for the conclusion of a compact under part 7

1 are being pursued, all proceedings to generally adjudicate
2 reserved Indian water rights and federal reserved water
3 rights of those tribes and federal agencies which are
4 negotiating are suspended. The obligation to file water
5 rights claims for those reserved rights is also suspended.
6 This suspension shall be effective until July 1, 1985 1987,
7 as long as negotiations are continuing or ratification of a
8 completed compact is being sought. If approval by the state
9 legislature and tribes or federal agencies has not been
10 accomplished by July 1, 1985 1987, the suspension shall
11 terminate on that date. Upon termination of the suspension
12 of this part, the tribes and the federal agencies shall be
13 subject to the special filing requirements of 85-2-702(3)
14 and all other requirements of the state water adjudication
15 system provided for in Title 85, chapter 2. Those tribes and
16 federal agencies that choose not to negotiate their reserved
17 water rights shall be subject to the full operation of the
18 state adjudication system and may not benefit from the
19 suspension provisions of this section."

20 SECTION 2. SECTION 85-2-224, MCA, IS AMENDED TO READ:

21 "85-2-224. Statement of claim. (1) The statement of
22 claim for each right arising under the laws of the state and
23 for each right reserved under the laws of the United States
24 which has been actually put to use shall include
25 substantially the following:

REFERENCE BILL

1 (a) the name and mailing address of the claimant;
 2 (b) the name of the watercourse or water source from
 3 which the right to divert or make use of water is claimed,
 4 if available;
 5 (c) the quantities of water and times of use claimed;
 6 (d) the legal description, with reasonable certainty,
 7 of the point or points of diversion and places of use of
 8 waters;
 9 (e) the purpose of use, including, if for irrigation,
 10 the number of acres irrigated;
 11 (f) the approximate dates of first putting water to
 12 beneficial use for the various amounts and times claimed in
 13 subsection (c); and
 14 (g) the sworn statement that the claim set forth is
 15 true and correct to the best of claimant's knowledge and
 16 belief.
 17 (2) The Any claimant filing a statement of claim under
 18 subsection (1) shall submit maps, plats, aerial photographs,
 19 decrees, or pertinent portions thereof, or other evidence in
 20 support of his claim. All maps, plats, or aerial
 21 photographs should show as nearly as possible to scale the
 22 point of diversion, place of use, place of storage, and
 23 other pertinent conveyance facilities.
 24 (3) Any statement of claim for rights reserved under
 25 the laws of the United States which have not yet been put to

1 use shall include substantially the following:
 2 (a) the name and mailing address of the claimant;
 3 (b) the name of the watercourse or water source from
 4 which the right to divert or make use of water is claimed,
 5 if available;
 6 (c) the quantities of water claimed;
 7 (d) the priority date claimed;
 8 (e) the laws of the United States on which the claim
 9 is based; and
 10 (f) the sworn statement that the claim set forth is
 11 true and correct to the best of claimant's knowledge and
 12 belief."
 13 Section 3. Section 85-2-231, MCA, is amended to read:
 14 "85-2-231. Preliminary decree. (1) The water judge
 15 shall issue a preliminary decree. The preliminary decree
 16 shall be based on:
 17 (a) the statements of claim before the water judge;
 18 (b) the data submitted by the department;
 19 (c) the contents of compacts approved by the Montana
 20 legislature and the tribe or federal agency or, lacking an
 21 approved compact, the filings for federal and Indian
 22 reserved rights; and
 23 (d) any additional data obtained by the water judge.
 24 The preliminary decree shall be issued within 90 days after
 25 the close of the special filing period set out in

1 85-2-702(3) or as soon thereafter as is reasonably feasible.
 2 This section does not prevent the water judge from issuing
 3 an interlocutory decree or other temporary decree if such a
 4 decree is necessary for the orderly administration of water
 5 rights prior to the issuance of a preliminary decree.

6 (2) A preliminary decree may be issued for any
 7 hydrologically interrelated portion of a water division,
 8 including but not limited to a basin, subbasin, drainage,
 9 subdrainage, stream, or single source of supply of water, at
 10 a time different from the issuance of other preliminary
 11 decrees or portions of the same decree.

12 (3) The preliminary decree shall contain the
 13 information and make the determinations, findings, and
 14 conclusions required for the final decree under 85-2-234.
 15 The water judge shall include in the preliminary decree ~~for~~
 16 ~~informational purposes~~ the contents of a compact negotiated
 17 under the provisions of part 7 that has been approved by the
 18 legislature and the tribe or federal agency ~~whether--or--not~~
 19 ~~it has been ratified by congress.~~

20 (4) If the water judge is satisfied that the report of
 21 the water master meets the requirements for the preliminary
 22 decree set forth in subsections (1) and (3), and is
 23 satisfied with the conclusions contained in the report, the
 24 water judge shall adopt the report as the preliminary
 25 decree. If the water judge is not so satisfied, he may, at

1 his option, recommit the report to the master with
 2 instructions, or modify the report and issue the preliminary
 3 decree."

4 SECTION 4. SECTION 85-2-233, MCA, IS AMENDED TO READ:

5 "85-2-233. Hearing on preliminary decree. (1) Upon
 6 objection to the preliminary decree by the department, a
 7 person named in the preliminary decree, or any other person,
 8 for good cause shown, the department or such person is
 9 entitled to a hearing thereon before the water judge.

10 (2) If a hearing is requested, such request must be
 11 filed with the water judge within 90 days after notice of
 12 entry of the preliminary decree. The water judge may, for
 13 good cause shown, extend this time limit an additional 90
 14 days if application for the extension is made within 90 days
 15 after notice of entry of the preliminary decree.

16 (3) The request for a hearing shall contain a precise
 17 statement of the findings and conclusions in the preliminary
 18 decree with which the department or person requesting the
 19 hearing disagrees. The request shall specify the paragraphs
 20 and pages containing the findings and conclusions to which
 21 objection is made. The request shall state the specific
 22 grounds and evidence on which the objections are based.

23 (4) Upon expiration of the time for filing objections
 24 and upon timely receipt of a request for a hearing, the
 25 water judge shall notify each party named in the preliminary

184

decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing shall be conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e).

(5) Objections to a compact negotiated and ratified under 85-2-702 or 85-2-703 shall be limited to:

(a) the authority of the state:

(i) to determine Indian or other federally reserved water rights through the procedure set forth in 85-2-702 and 85-2-703; and

(ii) to bind through such determination, for purposes of a final decree under 85-2-234, all persons whose existing rights are or may be affected by the compact; or

(b) the process by which the compact was negotiated or ratified.

(6) Failure to object under subsection (1) to a compact bars any subsequent cause of action based in whole or in part on those grounds for objection stated in subsection (5).

(7) If the court sustains an objection under

subsection (5), it shall declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the tribe party to the compact shall be permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall thereafter issue a new preliminary decree in accordance with 85-2-231; provided, however, that any party to a compact declared void may appeal from such determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal shall stay the period for filing a statement of claim as required under this subsection."

Section 5. Section 85-2-234, MCA, is amended to read:

"85-2-234. Final decree. (1) The water judge shall, on the basis of the preliminary decree and on the basis of any hearing that may have been held, enter a final decree affirming or modifying the preliminary decree. If no request for a hearing is filed within the time allowed, the preliminary decree automatically becomes final, and the water judge shall enter it as the final decree.

(2) The terms of a compact negotiated and ratified under 85-2-702 must be included in the final decree without alteration WITHOUT ALTERATION UNLESS AN OBJECTION IS SUSTAINED PURSUANT TO 85-2-233.

+2+(3) The final decree shall establish the existing

rights and priorities within the water judge's jurisdiction of persons required by 85-2-221 to file a claim for an existing right, and of persons required to file a declaration of existing rights in the Powder River Basin pursuant to an order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973, AND OF ANY FEDERAL AGENCY OR INDIAN TRIBE POSSESSING WATER RIGHTS ARISING UNDER FEDERAL LAW, REQUIRED BY 85-2-702 TO FILE CLAIMS.

(3)(4) The final decree shall state the findings of fact, along with any conclusions of law, upon which the existing rights and priorities of each person, FEDERAL AGENCY, AND INDIAN TRIBE named in the decree are based.

(4)(5) For each person who is found to have an existing right ARISING UNDER THE LAWS OF THE STATE OF MONTANA, the final decree shall state:

(a) the name and post-office address of the owner of the right;

(b) the amount of water, rate, and volume, included in the right;

(c) the date of priority of the right;

(d) the purpose for which the water included in the right is used;

(e) the place of use and a description of the land, if any, to which the right is appurtenant;

(f) the source of the water included in the right;

(g) the place and means of diversion;

(h) the inclusive dates during which the water is used each year;

(i) any other information necessary to fully define the nature and extent of the right.

(6) FOR EACH PERSON, TRIBE, OR FEDERAL AGENCY POSSESSING WATER RIGHTS ARISING UNDER THE LAWS OF THE UNITED STATES, THE FINAL DECREE SHALL STATE:

(A) THE NAME AND MAILING ADDRESS OF THE HOLDER OF THE RIGHT;

(B) THE SOURCE OR SOURCES OF WATER INCLUDED IN THE RIGHT;

(C) THE QUANTITY OF WATER INCLUDED IN THE RIGHT;

(D) THE DATE OF PRIORITY OF THE RIGHT;

(E) THE PURPOSE FOR WHICH THE WATER INCLUDED IN THE RIGHT IS CURRENTLY USED, IF AT ALL;

(F) THE PLACE OF USE AND A DESCRIPTION OF THE LAND, IF ANY, TO WHICH THE RIGHT IS APPURTENANT;

(G) THE PLACE AND MEANS OF DIVERSION, IF ANY; AND

(H) ANY OTHER INFORMATION NECESSARY TO FULLY DEFINE THE NATURE AND EXTENT OF THE RIGHT, INCLUDING THE TERMS OF ANY COMPACTS NEGOTIATED AND RATIFIED UNDER 85-2-702."

Section 6. Section 85-2-702, MCA, is amended to read:

"85-2-702. Negotiation with Indian tribes. (1) The

188

reserved water rights compact commission, created by 2-15-212, may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts authorized under 85-2-701. Compact proceedings shall be commenced by the commission. The commission shall serve by certified mail directed to the governing body of each tribe a written request for the initiation of negotiations under this part and a request for the designation of an authorized representative of the tribe to conduct compact negotiations. Upon receipt of such written designation from the governing body of a tribe, compact negotiations shall be considered to have commenced.

(2) When the compact commission and the Indian tribes or their authorized representatives have agreed to a compact, they shall sign a copy and file an original copy with the department of state of the United States of America and copies with the secretary of state of Montana and with the governing body for the tribe involved. The compact is effective and binding upon all parties upon ratification by the legislature of Montana, AND any affected tribal governing body, ~~and, if legally necessary, the congress of the United States or other appropriate federal authority.~~

(3) Upon its ~~approval~~ RATIFICATION by the Montana legislature and the tribe ~~or federal agency~~, the terms of a compact must be included in the preliminary decree ~~for~~

~~informational purposes~~ as provided by 85-2-231, and ~~unless renegotiated,~~ UNLESS AN OBJECTION TO THE COMPACT IS SUSTAINED UNDER 85-2-233, the terms of the compact must be included in the final decree without alteration WITHOUT ALTERATION. However, if approval of the state legislature and tribe ~~or federal agency~~ has not been accomplished by July 1, ~~1985~~ 1987, all ~~federal and~~ Indian claims for reserved water rights that have not been resolved by a compact must be filed with the department within ~~60 days~~ 6 months. These new filings shall be used in the formulation of the preliminary decree and shall be given treatment similar to that given to all other filings."

SECTION 7. SECTION 85-2-704, MCA, IS AMENDED TO READ:

"85-2-704. Termination of negotiations. (1) The commission or any ~~other party to the negotiations~~ negotiating tribe or federal agency may terminate negotiations by providing notice to all parties 30 days in advance of the termination date. On the termination date, the suspension of the application of part 2 provided for in 85-2-217 shall also terminate. The tribe or federal agency shall file all of its claims for reserved rights within ~~60 days~~ 6 months of the termination of negotiations.

(2) Once negotiations have been terminated pursuant to subsection (1), they may be reopened only by mutual agreement of the parties."

1 NEW SECTION. SECTION 8. STATUS REPORTS TO CHIEF WATER
2 JUDGE. (1) THE MONTANA RESERVED WATER RIGHTS COMPACT
3 COMMISSION MUST SUBMIT TO THE CHIEF WATER JUDGE, APPOINTED
4 PURSUANT TO 3-7-221, A REPORT ON THE STATUS OF ITS
5 NEGOTIATIONS ON JULY 1, 1985, AND EVERY 6 MONTHS THEREAFTER.

6 (2) EACH REPORT MUST STATE WHICH INDIAN TRIBES AND
7 FEDERAL AGENCIES ARE ENGAGED IN NEGOTIATIONS, WHETHER ANY
8 NEGOTIATIONS WITH INDIAN TRIBES OR FEDERAL AGENCIES HAVE
9 BEEN TERMINATED, AND THE PROGRESS OF NEGOTIATIONS ON A
10 TRIBE-BY-TRIBE AND AGENCY-BY-AGENCY BASIS. THE REPORT MUST
11 BE MADE AVAILABLE TO THE PUBLIC.

12 NEW SECTION. Section 9. Effective date. This act is
13 effective on passage and approval.

-End-

182

GOVERNOR'S PROPOSED AMENDMENTS
TO SENATE BILL NO. 28
REFERENCE COPY,
April 17, 1985

1. Page 1, line 8 through line 9.
Following: "NECESSARY"
Strike: "LIMITING THE OBJECTIONS THAT MAY BE
MADE TO A COMPACT IN THE WATER COURTS;"
2. Page 7, line 10 through line 20.
Strike: Subsection (5) in its entirety - renumber
subsequent subsections
3. Page 7, line 22.
Following: "compact"
Insert: "negotiated and ratified under 85-2-702 or
85-2-703
4. Page 7, line 22.
Following: "action"
Strike: "based in whole or in part on those grounds for
objection stated in subsection (5)."
Insert: "in the water court."
5. Page 7, line 25 through page 8, line 1.
Following: "objection"
Strike: "under subsection (5)"
Insert: "to a compact"
6. Page 8, line 1.
Following: "it"
Strike: "shall"
Insert: "may"
7. Page 8, line 24.
Following: "85-2-233"
Strike: ". "
Insert: "; provided that the court may not alter or amend
any of the terms of a compact except with the prior
written consent of the parties in accordance with
applicable law."
8. Page 11, line 21.
Following: "body"
Insert: ", and approval by the appropriate federal
authority."

SENATE BILL NO. 28

INTRODUCED BY ECK

BY REQUEST OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A 2-YEAR
EXTENSION OF THE EXISTENCE OF THE RESERVED WATER RIGHTS
COMPACT COMMISSION; PROVIDING FOR FEDERAL APPROVAL OF A
COMPACT ONLY IF LEGALLY NECESSARY; ~~LIMITING-THE-OBJECTIONS~~
~~THAT-MAY-BE-MADE-TO-A-COMPACT-IN-THE-WATER-COURTS;~~ REQUIRING
~~THAT-THE-TERMS-OF-A-COMPACT--SET--FORTH--IN--A--PRELIMINARY~~
~~DECREE---BE---REPRODUCED---UNCHANGED~~ PROVIDING AN ALTERNATE
STATEMENT OF CLAIM FOR RESERVED RIGHTS NOT YET PUT TO USE;
SPECIFYING THE INFORMATION RELATING TO RESERVED RIGHTS TO BE
INCLUDED; IN THE FINAL DECREE; EXTENDING FROM 60 DAYS TO 6
MONTHS THE TIME PERIOD FOR FILING IN THE WATER COURT CLAIMS
UNRESOLVED BY THE COMPACT COMMISSION; REQUIRING THE
COMMISSION TO MAKE STATUS REPORTS TO THE WATER JUDGE;
AMENDING SECTIONS 85-2-217, 85-2-224, 85-2-231, 85-2-233,
85-2-234, AND 85-2-702, AND 85-2-704, MCA; AND PROVIDING AN
IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-217, MCA, is amended to read:

"85-2-217. Suspension of adjudication. While
negotiations for the conclusion of a compact under part 7

are being pursued, all proceedings to generally adjudicate
reserved Indian water rights and federal reserved water
rights of those tribes and federal agencies which are
negotiating are suspended. The obligation to file water
rights claims for those reserved rights is also suspended.
This suspension shall be effective until July 1, 1985 1987,
as long as negotiations are continuing or ratification of a
completed compact is being sought. If approval by the state
legislature and tribes or federal agencies has not been
accomplished by July 1, 1985 1987, the suspension shall
terminate on that date. Upon termination of the suspension
of this part, the tribes and the federal agencies shall be
subject to the special filing requirements of 85-2-702(3)
and all other requirements of the state water adjudication
system provided for in Title 85, chapter 2. Those tribes and
federal agencies that choose not to negotiate their reserved
water rights shall be subject to the full operation of the
state adjudication system and may not benefit from the
suspension provisions of this section."

SECTION 2. SECTION 85-2-224, MCA, IS AMENDED TO READ:

"85-2-224. Statement of claim. (1) The statement of
claim for each right arising under the laws of the state and
for each right reserved under the laws of the United States
which has been actually put to use shall include
substantially the following:

(a) the name and mailing address of the claimant;

(b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;

(c) the quantities of water and times of use claimed;

(d) the legal description, with reasonable certainty, of the point or points of diversion and places of use of waters;

(e) the purpose of use, including, if for irrigation, the number of acres irrigated;

(f) the approximate dates of first putting water to beneficial use for the various amounts and times claimed in subsection (c); and

(g) the sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief.

(2) The Any claimant filing a statement of claim under subsection (1) shall submit maps, plats, aerial photographs, decrees, or pertinent portions thereof, or other evidence in support of his claim. All maps, plats, or aerial photographs should show as nearly as possible to scale the point of diversion, place of use, place of storage, and other pertinent conveyance facilities.

(3) Any statement of claim for rights reserved under the laws of the United States which have not yet been put to

use shall include substantially the following:

(a) the name and mailing address of the claimant;

(b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;

(c) the quantities of water claimed;

(d) the priority date claimed;

(e) the laws of the United States on which the claim is based; and

(f) the sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief."

Section 3. Section 85-2-231, MCA, is amended to read:

"85-2-231. Preliminary decree. (1) The water judge shall issue a preliminary decree. The preliminary decree shall be based on:

(a) the statements of claim before the water judge;

(b) the data submitted by the department;

(c) the contents of compacts approved by the Montana legislature and the tribe or federal agency or, lacking an approved compact, the filings for federal and Indian reserved rights; and

(d) any additional data obtained by the water judge. The preliminary decree shall be issued within 90 days after the close of the special filing period set out in

1 85-2-702(3) or as soon thereafter as is reasonably feasible.
 2 This section does not prevent the water judge from issuing
 3 an interlocutory decree or other temporary decree if such a
 4 decree is necessary for the orderly administration of water
 5 rights prior to the issuance of a preliminary decree.

6 (2) A preliminary decree may be issued for any
 7 hydrologically interrelated portion of a water division,
 8 including but not limited to a basin, subbasin, drainage,
 9 subdrainage, stream, or single source of supply of water, at
 10 a time different from the issuance of other preliminary
 11 decrees or portions of the same decree.

12 (3) The preliminary decree shall contain the
 13 information and make the determinations, findings, and
 14 conclusions required for the final decree under 85-2-234.
 15 The water judge shall include in the preliminary decree for
 16 informational purposes, the contents of a compact negotiated
 17 under the provisions of part 7 that has been approved by the
 18 legislature and the tribe or federal agency ~~whether--or--not~~
 19 ~~it has been ratified by congress.~~

20 (4) If the water judge is satisfied that the report of
 21 the water master meets the requirements for the preliminary
 22 decree set forth in subsections (1) and (3), and is
 23 satisfied with the conclusions contained in the report, the
 24 water judge shall adopt the report as the preliminary
 25 decree. If the water judge is not so satisfied, he may, at

1 his option, recommit the report to the master with
 2 instructions, or modify the report and issue the preliminary
 3 decree."

4 SECTION 4. SECTION 85-2-233, MCA, IS AMENDED TO READ:

5 "85-2-233. Hearing on preliminary decree. (1) Upon
 6 objection to the preliminary decree by the department, a
 7 person named in the preliminary decree, or any other person,
 8 for good cause shown, the department or such person is
 9 entitled to a hearing thereon before the water judge.

10 (2) If a hearing is requested, such request must be
 11 filed with the water judge within 90 days after notice of
 12 entry of the preliminary decree. The water judge may, for
 13 good cause shown, extend this time limit an additional 90
 14 days if application for the extension is made within 90 days
 15 after notice of entry of the preliminary decree.

16 (3) The request for a hearing shall contain a precise
 17 statement of the findings and conclusions in the preliminary
 18 decree with which the department or person requesting the
 19 hearing disagrees. The request shall specify the paragraphs
 20 and pages containing the findings and conclusions to which
 21 objection is made. The request shall state the specific
 22 grounds and evidence on which the objections are based.

23 (4) Upon expiration of the time for filing objections
 24 and upon timely receipt of a request for a hearing, the
 25 water judge shall notify each party named in the preliminary

158

decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing shall be conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e).

~~(5)--Objections-to-a-compact--negotiated--and--ratified under-85-2-702-or-85-2-703-shall-be-limited-to:~~

~~(a)--the-authority-of-the-state;~~

~~(i)--to--determine--Indian--or--other--federally--reserved water-rights-through-the-procedure-set-forth-in-85-2-702-and 85-2-703;-and~~

~~(ii)--to-bind-through-such-determination;-for--purposes of-a-final-decree-under-85-2-234;-all-persons-whose-existing rights-are-or-may-be-affected-by-the-compact;-or~~

~~(b)--the-process-by-which-the-compact-was-negotiated-or ratified;~~

~~(6)(5) Failure to object under subsection (1) to a compact NEGOTIATED AND RATIFIED UNDER 85-2-702 OR 85-2-703 bars any subsequent cause of action based-in-whole-or-in part-on-those-grounds-for--objection--stated--in--subsection (5); IN THE WATER COURT.~~

~~(7)(6) If the court sustains an objection under subsection-(5) TO A COMPACT, it shall MAY declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the tribe party to the compact shall be permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall thereafter issue a new preliminary decree in accordance with 85-2-231; provided, however, that any party to a compact declared void may appeal from such determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal shall stay the period for filing a statement of claim as required under this subsection."~~

Section 5. Section 85-2-234, MCA, is amended to read:

"85-2-234. Final decree. (1) The water judge shall, on the basis of the preliminary decree and on the basis of any hearing that may have been held, enter a final decree affirming or modifying the preliminary decree. If no request for a hearing is filed within the time allowed, the preliminary decree automatically becomes final, and the water judge shall enter it as the final decree.

(2) The terms of a compact negotiated and ratified under 85-2-702 must be included in the final decree without alteration WITHOUT ALTERATION UNLESS AN OBJECTION IS SUSTAINED PURSUANT TO 85-2-233; PROVIDED THAT THE COURT MAY

1 NOT ALTER OR AMEND ANY OF THE TERMS OF A COMPACT EXCEPT WITH
 2 THE PRIOR WRITTEN CONSENT OF THE PARTIES IN ACCORDANCE WITH
 3 APPLICABLE LAW.

4 {2}(3) The final decree shall establish the existing
 5 rights and priorities within the water judge's jurisdiction
 6 of persons required by 85-2-221 to file a claim for an
 7 existing right, and of persons required to file a
 8 declaration of existing rights in the Powder River Basin
 9 pursuant to an order of the department or a district court
 10 issued under sections 8 and 9 of Chapter 452, Laws of 1973,
 11 AND OF ANY FEDERAL AGENCY OR INDIAN TRIBE POSSESSING WATER
 12 RIGHTS ARISING UNDER FEDERAL LAW, REQUIRED BY 85-2-702 TO
 13 FILE CLAIMS.

14 {3}(4) The final decree shall state the findings of
 15 fact, along with any conclusions of law, upon which the
 16 existing rights and priorities of each person, FEDERAL
 17 AGENCY, AND INDIAN TRIBE named in the decree are based.

18 {4}(5) For each person who is found to have an
 19 existing right ARISING UNDER THE LAWS OF THE STATE OF
 20 MONTANA, the final decree shall state:

21 (a) the name and post-office address of the owner of
 22 the right;

23 (b) the amount of water, rate, and volume, included in
 24 the right;

25 (c) the date of priority of the right;

1 (d) the purpose for which the water included in the
 2 right is used;

3 (e) the place of use and a description of the land, if
 4 any, to which the right is appurtenant;

5 (f) the source of the water included in the right;

6 (g) the place and means of diversion;

7 (h) the inclusive dates during which the water is used
 8 each year;

9 (i) any other information necessary to fully define
 10 the nature and extent of the right.

11 (6) FOR EACH PERSON, TRIBE, OR FEDERAL AGENCY
 12 POSSESSING WATER RIGHTS ARISING UNDER THE LAWS OF THE UNITED
 13 STATES, THE FINAL DECREE SHALL STATE:

14 (A) THE NAME AND MAILING ADDRESS OF THE HOLDER OF THE
 15 RIGHT;

16 (B) THE SOURCE OR SOURCES OF WATER INCLUDED IN THE
 17 RIGHT;

18 (C) THE QUANTITY OF WATER INCLUDED IN THE RIGHT;

19 (D) THE DATE OF PRIORITY OF THE RIGHT;

20 (E) THE PURPOSE FOR WHICH THE WATER INCLUDED IN THE
 21 RIGHT IS CURRENTLY USED, IF AT ALL;

22 (F) THE PLACE OF USE AND A DESCRIPTION OF THE LAND, IF
 23 ANY, TO WHICH THE RIGHT IS APPURTENANT;

24 (G) THE PLACE AND MEANS OF DIVERSION, IF ANY; AND

25 (H) ANY OTHER INFORMATION NECESSARY TO FULLY DEFINE

144

1 THE NATURE AND EXTENT OF THE RIGHT, INCLUDING THE TERMS OF
 2 ANY COMPACTS NEGOTIATED AND RATIFIED UNDER 85-2-702."

3 Section 6. Section 85-2-702, MCA, is amended to read:

4 "85-2-702. Negotiation with Indian tribes. (1) The
 5 reserved water rights compact commission, created by
 6 2-15-212, may negotiate with the Indian tribes or their
 7 authorized representatives jointly or severally to conclude
 8 compacts authorized under 85-2-701. Compact proceedings
 9 shall be commenced by the commission. The commission shall
 10 serve by certified mail directed to the governing body of
 11 each tribe a written request for the initiation of
 12 negotiations under this part and a request for the
 13 designation of an authorized representative of the tribe to
 14 conduct compact negotiations. Upon receipt of such written
 15 designation from the governing body of a tribe, compact
 16 negotiations shall be considered to have commenced.

17 (2) When the compact commission and the Indian tribes
 18 or their authorized representatives have agreed to a
 19 compact, they shall sign a copy and file an original copy
 20 with the department of state of the United States of America
 21 and copies with the secretary of state of Montana and with
 22 the governing body for the tribe involved. The compact is
 23 effective and binding upon all parties upon ratification by
 24 the legislature of Montana, AND any affected tribal
 25 governing body, and, if legally necessary, the congress of

1 the United States or other appropriate federal authority,
 2 AND APPROVAL BY THE APPROPRIATE FEDERAL AUTHORITY.

3 (3) Upon its approval RATIFICATION by the Montana
 4 legislature and the tribe or federal agency, the terms of a
 5 compact must be included in the preliminary decree for
 6 informational purposes as provided by 85-2-231, and unless
 7 renegotiated, UNLESS AN OBJECTION TO THE COMPACT IS
 8 SUSTAINED UNDER 85-2-233, the terms of the compact must be
 9 included in the final decree without alteration WITHOUT
 10 ALTERATION. However, if approval of the state legislature
 11 and tribe or federal agency has not been accomplished by
 12 July 1, ~~1985~~ 1987, all federal and Indian claims for
 13 reserved water rights that have not been resolved by a
 14 compact must be filed with the department within 60 days 6
 15 months. These new filings shall be used in the formulation
 16 of the preliminary decree and shall be given treatment
 17 similar to that given to all other filings."

18 SECTION 7. SECTION 85-2-704, MCA, IS AMENDED TO READ:

19 "85-2-704. Termination of negotiations. (1) The
 20 commission or any other party to the negotiations
 21 negotiating tribe or federal agency may terminate
 22 negotiations by providing notice to all parties 30 days in
 23 advance of the termination date. On the termination date,
 24 the suspension of the application of part 2 provided for in
 25 85-2-217 shall also terminate. The tribe or federal agency

1 shall file all of its claims for reserved rights within 60
2 days 6 months of the termination of negotiations.

3 (2) Once negotiations have been terminated pursuant to
4 subsection (1), they may be reopened only by mutual
5 agreement of the parties."

6 NEW SECTION. SECTION 8. STATUS REPORTS TO CHIEF WATER
7 JUDGE. (1) THE MONTANA RESERVED WATER RIGHTS COMPACT
8 COMMISSION MUST SUBMIT TO THE CHIEF WATER JUDGE, APPOINTED
9 PURSUANT TO 3-7-221, A REPORT ON THE STATUS OF ITS
10 NEGOTIATIONS ON JULY 1, 1985, AND EVERY 6 MONTHS THEREAFTER.

11 (2) EACH REPORT MUST STATE WHICH INDIAN TRIBES AND
12 FEDERAL AGENCIES ARE ENGAGED IN NEGOTIATIONS, WHETHER ANY
13 NEGOTIATIONS WITH INDIAN TRIBES OR FEDERAL AGENCIES HAVE
14 BEEN TERMINATED, AND THE PROGRESS OF NEGOTIATIONS ON A
15 TRIBE-BY-TRIBE AND AGENCY-BY-AGENCY BASIS. THE REPORT MUST
16 BE MADE AVAILABLE TO THE PUBLIC.

17 NEW SECTION. Section 9. Effective date. This act is
18 effective on passage and approval.

-End-

124